

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

FILED
06 MAR 20 PM 1:55
DIVISION OF
ADMINISTRATIVE
HEARINGS

KAREN HOWE, PERSONAL,
REPRESENTATIVE OF THE ESTATE OF
STEPHEN HOWE,

EEOC Case No. 15DA30075463

FCHR Case No. 23-02170

Petitioner,

DOAH Case No. 04-3236

v.

FCHR Order No. 06-027

WESTERN AND SOUTHERN FINANCIAL
GROUP,

Respondent.

**FINAL ORDER AWARDING AFFIRMATIVE RELIEF
FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

Preliminary Matters

The Complainant in this matter, Stephen Howe, filed a complaint with the Commission in May of 2003, prior to his death, alleging that Respondent had unlawfully terminated him from his position as an Insurance Agent on the basis of his disability, identified in the Recommended Order currently before the Commission as sleep apnea, and an adrenal gland tumor and subsequent effects on his physical health.

Upon completion of its investigation, the Commission issued a "no cause" determination, and the Personal Representative of the Complainant's estate filed a Petition for Relief, which was transmitted by the Commission to the Division of Administrative Hearings on September 13, 2004.

On January 19, 2005, Judge Don W. Davis issued an "Order Closing File" in this matter, indicating that Petitioner's representative had failed to respond to an Order to Show Cause directing Petitioner's representative to show cause in writing that a factual and legal basis existed for the continued maintenance of this proceeding.

The Commission subsequently issued an "Order Remanding Petition for Relief from an Unlawful Employment Practice," dated March 8, 2005, in which it found that Petitioner's representative had timely filed a response to the Order to Show Cause, but had mistakenly filed the response in the wrong forum, with the Commission, instead of with the Division of Administrative Hearings, and that therefore the doctrine of equitable tolling applied and further proceedings on the Petition for Relief should be conducted.

Judge Davis then issued an "Order Declining Remand," dated March 15, 2005, indicating that "re-opening the case would be a nullity in view of the Florida Supreme Court's recent decision in Knowles v. Beverly Enterprises-Florida, Inc., --- So. 2d ---, 2004 WL 2922097 (Fla. 2004)..." Judge Davis concluded, "Knowles basically holds that

claims for violation of statutory rights die with the claimant except in those instances where the alleged violation resulted in the claimant's death."

The Commission subsequently issued an "Order Remanding Petition for Relief from an Unlawful Employment Practice," dated April 20, 2005, in which it concluded that "Complainant's cause of action under the Florida Civil Rights Act of 1992 did not die with the person and that it may be commenced and prosecuted by Complainant's personal representative, as set out in Section 46.021, Florida Statutes (2003)."

Upon acceptance of the remand, an evidentiary hearing was held in Pensacola, Florida, on August 23, 2005, before Judge Davis.

Judge Davis issued a Recommended Order, dated November 16, 2005, again concluding that the Commission and the Division of Administrative Hearings did not have jurisdiction of the matter, but recommending that, if jurisdiction did exist, Respondent unlawfully discriminated against Petitioner, and recommending affirmative relief in that instance.

Pursuant to notice, public deliberations were held on March 14, 2006, 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 Recommended Order.

On March 13, 2006, the day before the above-indicated deliberation hearing, Petitioner filed with the Commission a document entitled, "Petitioner's Memorandum in Opposition to Respondent's Exceptions to Recommended Order." At the deliberation hearing Respondent objected to this filing as untimely. At the deliberation hearing, the Commission panel unanimously voted to exclude the document from consideration, as untimely (Respondent's exceptions were served on December 7, 2005). See Fla. Admin. Code R 28-106.217(2) and (3), requiring responses to exceptions to be filed within 10 days from the date the exceptions were served.

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

For reasons set out in the "Order Remanding Petition for Relief from an Unlawful Employment Practice," issued in this matter by the Commission on April 20, 2005, and incorporated herein by reference, we reject the Administrative Law Judge's conclusion that the Commission and the Division of Administrative Hearings do not have jurisdiction of this matter because the Petitioner is deceased.

With this limitation, we find the Administrative Law Judge's application of the law to the facts, leading to the conclusion that an unlawful employment practice occurred in this matter, to result in a correct disposition of the matter.

With this limitation, we adopt the Administrative Law Judge's conclusions of law.

Exceptions

Respondent filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled "Respondent's Exceptions to Recommended Order."

Respondent filed 22 numbered exceptions to the Administrative Law Judge's findings of fact. These paragraphs except to the facts found (1, 2, 3, 4, 5, 9, 12, 13, 14, 16, 17, 21, 22), not found (7, 8, 13, 17), credibility determinations made (11), and inferences drawn (1, 3, 15, 22) from the evidence presented. For some of the exceptions paragraphs the actual "exception" is unclear (6, 10, 18, 19, 20).

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).

Respondent filed four numbered exceptions to the Administrative Law Judge's conclusions of law.

The first exception appears to take issue with the Administrative Law Judge's conclusion that a prima facie case of discrimination was established, the conclusion that Petitioner is disabled within the meaning of the law, and the conclusion that Petitioner is "qualified" within the meaning of the law.

In our view, the Administrative Law Judge's findings on these issues are specific.

In cases such as the instant case 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, to establish a prima facie case of discrimination it must be shown that (1) Petitioner is a handicapped individual under the act; (2) that Petitioner is otherwise qualified for the position sought or hired; and (3) that Petitioner was excluded from the position solely by reason of his or her handicap. Brand v. Florida Power Corporation, 633 So. 2d 504, at 508, footnote 5, and 510 (Fla. 1st DCA 1994).

Applying this to the instant case, the Administrative Law Judge concluded that Petitioner was handicapped / disabled within the meaning of the law, concluding that the inability to breathe while sleeping or control of body metabolism as a result of an adrenal gland tumor amounted to a physical or mental impairment that substantially limits one or

more major life activities. Recommended Order, ¶ 50. The Administrative Law Judge concluded that Petitioner was qualified for his position stating, “[t]estimony received at final hearing, coupled with medical correspondence presented at hearing, indicates that Petitioner could have continued in his employment with reasonable accommodation,” and “[i]n this case, the evidence indicates that Petitioner, with the accommodations previously denied by Respondent, was qualified to continue to work as an insurance salesman for Respondent.” Recommended Order, ¶ 49 and ¶ 52. With regard to the third element, the Administrative Law Judge concluded “Respondent’s assignment of duties to Petitioner, requiring that he, and he alone, drive his car in the course of his job, was without the reasonable accommodation of permitting Petitioner to use a chauffeur at his own expense, and must be considered pretextual.” Recommended Order, ¶ 51.

An Administrative Law Judge’s findings may be overturned only if they are not supported by competent substantial evidence. See Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205, at 1210 (Fla. 1st DCA 1991), and Section 120.57(1)(l), Florida Statutes (2005).

The second exception to the Administrative Law Judge’s conclusions of law states that “[t]he Recommended Order incorrectly concludes that the employer was required to accommodate an essential function of the sales agent position by allowing the Petitioner to have a chauffeur in order to fulfill an essential function.”

It has been stated, “Reasonable accommodation may include, but shall not be limited to: (1) Making facilities readily accessible to and usable by handicapped persons, and (2) job restructuring, part-time or modified work schedules, acquisition or modification of equipment or devices, appropriate adjustment or modification of examinations, the provision of readers and interpreters, and other similar actions.” Brand v. Florida Power Corporation, 633 So. 2d 504, at 511 (Fla. 1st DCA 1994).

The Administrative Law Judge specifically found on the facts of this case that “Respondent knew Petitioner’s disability. No credible evidence was presented, however, that Respondent’s requirement that Petitioner drive his own automobile was conducive to the reasonable accommodation requested by Petitioner and his wife. Such accommodation was certainly feasible.” Recommended Order, ¶ 53.

To re-state, an Administrative Law Judge’s findings may be overturned only if they are not supported by competent substantial evidence. See Bryant, supra, and Section 120.57(1)(l), Florida Statutes (2005).

Exceptions 3 and 4 appear to include statements of law that in Respondent’s view are applicable to the instant case, but do not specifically identify a conclusion of law of the Administrative Law Judge to which Respondent excepts.

Respondent’s exceptions are rejected.

Affirmative Relief

Through our adoption of the Administrative Law Judge’s findings of fact and conclusions of law, as set out above, we find that unlawful discrimination occurred in this

matter in the manner found by the Administrative Law Judge and have adopted the Administrative Law Judge's recommendations for the remedy of the discrimination.

Respondent is hereby ORDERED:

(1) to cease and desist from discriminating further in the manner it has been found to have unlawfully discriminated against Petitioner;

(2) to remit back pay to Petitioner in the amount of \$17,523.78 in the manner recommended by the Administrative Law Judge in the Recommended Order;

(3) to pay Petitioner the statutorily established interest on the amounts awarded Petitioner in (2), above;

(4) to pay Petitioner lost benefits in the manner recommended by the Administrative Law Judge in the Recommended Order from the time of Petitioner's termination until the time of Petitioner's death;

(5) to pay Petitioner attorney's fees that have been reasonably incurred in this matter by Petitioner; and

(6) to pay Petitioner the amount of costs that has been reasonably incurred in this matter by Petitioner.

The Commission reserves jurisdiction over the determination of precise remedy in this matter, including, but not limited to, amounts of back pay, interest, benefits, attorney's fees, and costs awarded Petitioner.

If, within 30 days of the date of the filing of this Order by the Clerk of the Commission, the parties have agreed to the appropriate remedy amounts for the unlawful employment practice found to have occurred, the parties shall prepare and submit to the Commission a Joint Stipulation of Settlement.

If, within 30 days of the date of the filing of this Order by the Clerk of the Commission, the parties are unable to reach agreement as to the remedy amounts for the unlawful employment practice found to have occurred, the Petitioner is directed to file with the Commission a Notice of Failure of Settlement, and the case will be remanded to the Administrative Law Judge for determination of the appropriate remedy amounts in this matter, as ordered above.

The Commission shall offer its mediation services to the parties to facilitate settlement within the specified 30-day period.

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 16th day of March, 2006.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Keith Roberts, Panel Chairperson;
Commissioner Gayle Cannon; and
Commissioner Shahrukh S. Dhanji

Filed this 16th day of March, 2006,
in Tallahassee, Florida.



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

NOTICE TO COMPLAINANT / PETITIONER

As your complaint was filed under Title VII of the Civil Rights Act of 1964, which is enforced by the U.S. Equal Employment Opportunity Commission (EEOC), you have the right to request EEOC to review this Commission's final agency action. To secure a "substantial weight review" by EEOC, you must request it in writing within 15 days of your receipt of this Order. Send your request to Miami District Office (EEOC), One Biscayne Tower, 2 South Biscayne Blvd., Suite 2700, 27th Floor, Miami, FL 33131.

Copies furnished to:

Karen Howe, Personal Representative of the Estate of
Stephen Howe
c/o Daniel Stewart, Esq.
4519 Highway 90
Pace, FL 32571

Western and Southern Financial Group
c/o Linda Bond, Esq.
Rumberger, Kirk & Caldwell
Post Office Box 10507
Tallahassee, FL 32302-2507

Don W. Davis, 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 16th day of March, 2006.

By: *Wesley Crawford*
Clerk of the Commission
Florida Commission on Human Relations