

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

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DIVISION OF
ADMINISTRATIVE
HEARINGS

TIM A. WEAVER,

EEOC Case No. 15DA500402

Petitioner,

FCHR Case No. 2005-01042

v.

DOAH Case No. 05-2971

SWIFT TRANSPORTATION,

FCHR Order No. 06-011

Respondent.

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

Preliminary Matters

Petitioner Tim A. Weaver filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2003), alleging that Respondent Swift Transportation committed an unlawful employment practice on the basis of Petitioner's disability (obesity, tremors, sleep apnea) by failing to hire Petitioner for employment as a truck driver.

The allegations set forth in the complaint were investigated, and, on July 5, 2005, 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 on October 20, 2005, in Ocala, Florida, before Administrative Law Judge Harry L. Hooper.

Judge Hooper issued a Recommended Order of dismissal, dated December 5, 2005.

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

A transcript of the proceeding before the Administrative Law Judge was not filed with the Commission. In the absence of a transcript of the proceeding before the Administrative Law Judge, the Recommended Order is the only evidence for the Commission to consider. See National Industries, Inc. v. Commission on Human Relations, et al., 527 So. 2d 894, at 897, 898 (Fla. 5th DCA 1988). Accord, Beach-Gutierrez v. Bay Medical Center, FCHR Order No. 05-011 (January 19, 2005), and Waaser v. Streit's Motorsports, FCHR Order No. 04-157 (November 30, 2004).

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 to establish a prima facie case of discrimination, Petitioner must provide evidence that: "(1) he was handicapped; (2) that he was able to perform the duties of a long-haul truck driver satisfactorily, with or without accommodation; and (3) that he suffered an adverse employment decision because of his disability." Recommended Order, ¶ 24. The Administrative Law Judge concluded that a prima facie case was not established because Petitioner failed to establish that he was handicapped. Recommended Order, ¶ 32.

We note that, for purposes of identifying the appropriate test to be used for determining a prima facie case of handicap /disability discrimination, the Commission distinguishes situations where the Respondent acknowledges that it took the adverse employment action complained of on the basis of Petitioner's alleged disability from situations where the Respondent does not acknowledge that it took the adverse employment action complained of on the basis of Petitioner's alleged disability. See, e.g., Casanova v. Worldwide Flight Services, FCHR Order No. 05-043 (April 20, 2005).

In the latter situation, the Commission does not agree that the third element of the test cited by the Administrative Law Judge is an appropriate element of the test for a prima facie case of discrimination, concluding that this is actually what a Petitioner is attempting to show by establishing a prima facie case. Id.

The instant case, however, is an example of the former situation.

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 also falls into the second category of cases, and, thus, the test cited by the Administrative Law Judge is appropriate for this case. Id.

We adopt the Administrative Law Judge's conclusions of law.

Exceptions

Neither party filed exceptions to the Administrative Law Judge's Recommended Order.

Dismissal

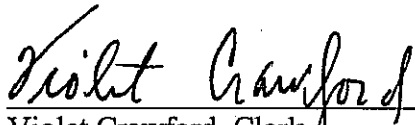
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 24th day of February, 2006.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Roosevelt Paige, Panel Chairperson;
Commissioner Anice R. Prosser; and
Commissioner Dominique B. Saliba, M.D.

Filed this 24th day of February, 2006,
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, FL 32301
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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:

Tim A. Weaver
15054 Northeast 150th Lane
Fort McCoy, FL 32154

Swift Transportation
c/o Stephen J. Beaver, Esq.
Post Office Box 29243
Phoenix, AZ 85038

Harry L. Hooper, 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 24th day of February, 2006.

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