

STATE OF FLORIDA  
COMMISSION ON HUMAN RELATIONS

FILED

2006 JUN 21 A 11:17

DANETTE MARSHALL,

Petitioner,

v.

SAM'S EAST, INC.,

Respondent.

EEOC Case No. 15DA1500516

FCHR Case No. 2005-0148

DOAH Case No. 05-4056

FCHR Order No. 06-060

COMMISSION OF  
ADMINISTRATIVE  
HEARINGS

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

Preliminary Matters

Petitioner Danette Marshall 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, Sam's East, Inc., committed unlawful employment practices on the basis of Petitioner's disability (alleged to be bilateral plantar fasciitis) by failing to provide Petitioner with a reasonable accommodation and by terminating Petitioner from her position as a greeter.

The allegations set forth in the complaint were investigated, and, on September 26, 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 January 17, 2006, in Tallahassee, Florida, before Administrative Law Judge John G. Van Laningham.

Judge Van Laningham issued a Recommended Order of dismissal, dated April 3, 2006.

Pursuant to notice, public deliberations were held on June 16, 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.

### 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 to establish a prima facie case of discrimination on the basis of handicap / disability, Petitioner must show "1) that he or she is a person with a disability; 2) that he or she is 'qualified' for the position apart from his or her disability; and 3) that he or she was denied the position [or otherwise discriminated against]...because of his or her disability." Recommended Order, ¶ 14.

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 Respondent acknowledges that it took the adverse employment action complained of on the basis of Petitioner's alleged disability from situations where 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 situation presented in the instant case, the Commission does not agree that the third element of the test cited by the Administrative Law Judge, the demonstration of a causal connection between the alleged discriminatory act and Petitioner's protected class, 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. See Casanova, supra, and 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. Accord, Lenard v. A.L.P.H.A. "A Beginning" Inc., FCHR Order No. 06-034 (April 13, 2006).

(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.)

With regard to cases like the instant case, where Respondent contends it took the adverse employment action complained of for reasons other than Petitioner's alleged handicap / disability (in this case the Administrative Law Judge found that Respondent terminated Petitioner because of Petitioner's chronic absenteeism and professed inability to perform the job of greeter without a stool on which to sit and rest from time to time – see Recommended Order, ¶ 10), 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, supra.

We modify accordingly the Administrative Law Judge's conclusions of law regarding the appropriate test for 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)(l), Florida Statutes (2005).

The error in the test used by the Administrative Law Judge to determine the existence of a prima facie case is harmless since in both that test and the appropriate test Petitioner must establish that she is disabled / handicapped within the meaning of the statute, and the Administrative Law Judge concluded that Petitioner failed to establish this (See Recommended Order, ¶ 20).

With the indicated modification, we adopt the Administrative Law Judge's conclusions of law.

### Exceptions

Petitioner filed a one-page document containing exceptions to the Recommended Order with Division of Administrative Hearings, rather than with the Commission.

There is no indication on the document that it was served on Respondent as is required by Fla. Admin. Code R. 28-106.110.

It appears that the document excepts to the Administrative Law Judge's finding that Petitioner was not handicapped / disabled within the meaning of the law.

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).

With regard to findings of fact set out in Recommended Orders, the Administrative Procedure Act states, "The agency may not reject or modify the findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law." Section 120.57(1)(1), Florida Statutes (2005).

Given the role of the Administrative Law Judge set out above in Barr, and the constraints on the Commission's ability to overturn findings of fact as set out in the Administrative Procedure Act, above, there is no legal basis for the Commission to overturn the Administrative Law Judge's finding that Petitioner was not disabled / handicapped within the meaning of the law.

Petitioner's exceptions are rejected.

### Dismissal

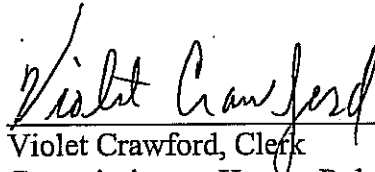
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 20th day of June, 2006.  
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam, Panel Chairperson;  
Commissioner Onelia A. Fajardo; and  
Commissioner Mario M. Valle

Filed this 20th day of June, 2006,  
in Tallahassee, Florida.



Violet Crawford, Clerk  
Commission on Human Relations  
2009 Apalachee Parkway, Suite 100  
Tallahassee, FL 32301  
(850) 488-708

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:

Danette Marshall  
4200 Inverray Boulevard, Suite 3702  
Lauderhill, FL 33319

Sam's East, Inc.  
c/o Lindsay A. Connor, Esq.  
c/o Amy R. Harrison, Esq.  
Ford & Harrison, LLP  
225 Water Street, Suite 710  
Jacksonville, FL 32202

John G. Van Laningham, 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 20th day of June, 2006.

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