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DIVISION OF
ADMINISTRATIVE
HEARINGS

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

JANE SEIDEN,

Petitioner,

v.

WEXFORD HEALTH SOURCES, INC.,

Respondent.

EEOC Case No. NONE

FCHR Case No. 2006-00218

DOAH Case No. 06-2400

FCHR Order No. 07-024

FINAL ORDER DISMISSING PETITION FOR RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE

Preliminary Matters

Petitioner Jane Seiden 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 Wexford Health Sources, Inc., committed an unlawful employment practice on the basis of Petitioner's perceived disability (cancer of the kidney) when it terminated Petitioner from her position as an LPN. The complaint of discrimination also included an allegation that Petitioner had been discriminated against on the basis of her sexual orientation, but this claim was not advanced in the Petition for Relief.

The allegations set forth in the complaint were investigated, and, on May 30, 2006, 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 by video teleconference on September 20, 2006, at sites in Tallahassee and Lauderdale Lakes, Florida, and Pittsburgh, Pennsylvania, before Administrative Law Judge Florence Snyder Rivas.

Judge Rivas left employment with the Division of Administrative Hearings without entering a Recommended Order, and the case was transferred to Administrative Law Judge Larry J. Sartin, who issued a Recommended Order of dismissal, dated January 18, 2007.

Pursuant to notice, public deliberations were held on March 22, 2007, 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 the complaint in this matter was not timely-filed (i.e., that it was not filed within 365 days of the alleged discriminatory act), and therefore the Petition for Relief should be dismissed (See Recommended Order, ¶ 56). But the Administrative Law Judge also decided the case on the merits, indicating that Petitioner failed to establish a prima facie case of discrimination (Recommended Order, ¶ 69).

In a similar situation a Commission panel stated, "Because of findings of fact and conclusions of law indicating that the matter should be dismissed for lack of the existence of a prima facie case of discrimination, we find it unnecessary to either accept or reject the conclusion of law that the complaint of discrimination was untimely. Accord, Cox v. University of Florida, FCHR Order No. 04-145 (November 4, 2004), in which a Commission panel declined to either accept or reject a conclusion of law which was not dispositive of the case given the decision on the merits, namely, that the Petition for Relief was not timely." Roche v. J. C. Penney Company, Inc., FCHR Order No. 06-078 (September 18, 2006).

Similarly, we conclude that, because of the decision on the merits against Petitioner, it is unnecessary to either accept or reject the conclusion of law that the complaint of discrimination was untimely. Accord Bagley v. City of Tampa, Florida, FCHR Order No. 06-101 (November 13, 2006).

The Administrative Law Judge concluded that to establish a prima facie case of discrimination on the basis of handicap / disability, Petitioner must show that (1) she has a disability; (2) she was a qualified individual; and (3) she was discriminated against because of her disability. Recommended Order, ¶ 57.

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.

(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 Petitioner had exhausted the 26 weeks of short-term disability leave allowed by Respondent's policies - see Recommended Order, ¶ 32 through ¶ 34), 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. But, cf., Lenard v. A.L.P.H.A. "A Beginning" Inc., 945 So. 2d 618 (Fla. 2nd DCA 2006), in which an order of the Commission containing a similar correction to

the conclusions of law was appealed, and in which, without specifically correcting the Commission's order on this issue, the court in upholding the Commission's order indicated that to establish a prima facie case of disability discrimination under either the ADA or the Florida Civil Rights Act of 1992 Petitioner "must establish that (1) he or she has a statutorily covered disability; (2) he or she is a qualified individual; and (3) he or she was discriminated against because of his or her disability."

In modifying these conclusions of law of the Administrative Law Judge, the Commission concludes: (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 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 she is a qualified individual who with or without a reasonable accommodation can perform the essential requirements of the job in question, and the Administrative Law Judge concluded that Petitioner failed to establish this (See Recommended Order, ¶ 69).

With these comments and corrections, 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, "Jane Seiden's Exceptions to Recommended Order and Request for New Administrative Hearing," containing six numbered exceptions paragraphs, received by the Commission on February 2, 2007.

The first exception paragraph takes issue with the assignment of Administrative Law Judge Larry J. Sartin to write the Recommended Order in this case, when the matter was actually heard by Administrative Law Judge Florence Snyder Rivas, and requests that the Recommended Order be vacated and a new hearing ordered.

The Recommended Order states that Judge Rivas had left employment with the Division of Administrative Hearings without entering a Recommended Order in this case.

The Administrative Procedure Act states, "If the administrative law judge assigned to a hearing becomes unavailable, the division shall assign another administrative law judge who shall use any existing record and receive any additional evidence or argument, if any, which the new administrative law judge finds necessary." Section 120.57(1)(a), Florida Statutes (2005).

This exception is rejected. Accord, Lucas v. Department of Children and Family Services, FCHR Order No. 07-023 (March 12, 2007).

Exception paragraph 2 excepts to the finding that Respondent "reasonably interpreted its leave policy as not intended to give any additional time off." In our view, while the exception attacks the credibility of Respondent's witnesses on this issue, the finding is supported by evidence in the record.

This exception is rejected.

Exceptions paragraphs 3 through 5, all deal with the issue of findings made by the Administrative Law Judge as to when Petitioner was told she was going to be terminated, and the official date of the termination, all as they relate to whether the complaint was timely filed within 365 days of the alleged discriminatory act of termination. As indicated above, we have found it unnecessary to accept or reject the Administrative Law Judge's conclusion that the complaint was not timely filed, given the decision rendered by the Administrative Law Judge on the merits of the case against Petitioner.

Consequently, given our adoption of the resolution of the matter recommended by the Administrative Law Judge, these exceptions are rejected.

Exception paragraph 6 argues that the Administrative Law Judge used the wrong test for determining whether a prima facie case had been established, maintaining apparently that the case is a "failure to accommodate" case as opposed to a disparate treatment case. A review of both the Complaint and Petition for Relief suggest that Petitioner alleged that she was terminated on the basis of her disability or perceived disability, and neither appear to contain allegations of "failure to accommodate." See Filings. The test for a prima facie case of unlawful termination is set out above, in the Conclusions of Law section of this Order. The test for establishing a prima facie case in a "failure to accommodate case" is that Petitioner must show "(1) that he or she is a handicapped individual under the act; (2) that he or she was otherwise qualified for the position [in question]; (3) that he or she was excluded from the position sought solely by reason of his or her handicap..." Brand v. Florida Power Corporation, 633 So. 2d 504, at 510 (Fla. 1st DCA 1994); see also Brand, supra, at 508, fn. 5, for additional explanation. In either test, Petitioner must establish that she is a "qualified" individual. This Petitioner failed to do. See Recommended Order, ¶ 69.

This exception is rejected.

Dismissal

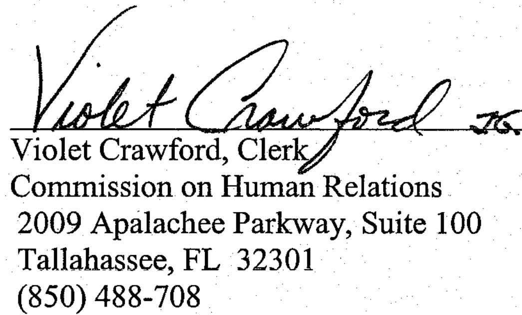
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 27th day of March, 2007.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Gilbert M. Singer, Panel Chairperson;
Commissioner Gayle Cannon; and
Commissioner Billy Whitefox Stall

Filed this 27th day of March, 2007,
in Tallahassee, Florida.



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

Copies furnished to:

Jane Seiden
c/o Scott M. Behren, Esq.
Scott M. Behren, P.A.
2853 Executive Park Drive, Suite 103
Weston, FL 33326

Wexford Health Sources, Inc.
c/o Robert J. Sniffen, Esq.
c/o Roger Salmonsen, Esq.
Sniffen Law Firm, P.A.
211 East Call Street
Tallahassee, FL 32301

Larry J. Sartin, 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 27th day of March, 2007.

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