

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

ALICIA HAYS,

EEOC Case No. 15DA600553

Petitioner,

FCHR Case No. 2006-01668

v.

DOAH Case No. 06-5073

DEPARTMENT OF CHILDREN AND
FAMILY SERVICES AND AGENCY FOR
PERSONS WITH DISABILITIES,

FCHR Order No. 07-056

Respondents.

DIVISION OF
ADMINISTRATIVE
HEARINGS

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FILED

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

Preliminary Matters

Petitioner Alicia Hays filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2003), alleging that Respondents Department of Children and Family Services and Agency for Persons with Disabilities committed an unlawful employment practice on the basis of Petitioner's disability (back / neck injuries) when it terminated Petitioner from employment.

The allegations set forth in the complaint were investigated, and, on November 15, 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 on May 8 and 9, 2007, in Chattahoochee, Florida, before Administrative Law Judge Harry L. Hooper.

Judge Hooper issued a Recommended Order of dismissal, dated July 25, 2007.

Pursuant to notice, public deliberations were held on October 10, 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 to establish a prima facie case of discrimination on the basis of handicap / disability, Petitioner must show "(1) that she is a handicapped individual under the act; (2) that she is otherwise qualified for the position sought or hired; and (3) that she was terminated solely by reason of her handicap. See Brand v. Florida Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994)." Recommended Order, ¶ 45.

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 Brand, supra, cited by the Administrative Law Judge, 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 ALJ 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 Ms. Owens considered Petitioner's work unacceptable - see Recommended Order, ¶ 48), 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. Accord, Seiden v. Wexford Health Sources, Inc., FCHR Order No. 07-024 (March 27, 2007), 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, 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 (2007).

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 handicapped / disabled within the meaning of the law, and the Administrative

Law Judge concluded that Petitioner failed to establish this (See Recommended Order, ¶ 47).

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, "Petitioner's Exceptions to Recommended Order," received by the Commission on August 9, 2007.

Petitioner essentially excepts to the Administrative Law Judge's conclusion that Petitioner is not disabled or perceived to be disabled within the meaning of the law, and that Petitioner did not establish that her termination was a pretext for discrimination.

A showing that Petitioner is disabled or perceived to be disabled is an element of the test for a prima facie case. Even if Petitioner's exceptions to the Administrative Law Judge's conclusions that Petitioner was not disabled or perceived to be disabled were accepted, the Administrative Law Judge still further concluded that, even if a prima facie case of discrimination had been shown, Respondent presented a legitimate nondiscriminatory reason for terminating Petitioner, and there was no showing that this reason was pretextual. See Recommended Order, ¶ 48.

With regard to Petitioner's exception to the conclusion that there was no showing that the reasons given for Petitioner's termination were a pretext for discrimination, 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).

Further, it is well settled that since an Administrative Law Judge's finding of whether discrimination occurred is a finding of fact, the Commission may overturn such a finding only if, after reviewing the complete record of the case, the Commission determines that the finding is not supported by competent substantial evidence in the record or that the proceeding leading to the determination did not comply with the essential requirements of law. See, Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205, at 1210 (Fla. 1st DCA 1991), accord, Perry v. Embry-Riddle Aeronautical University, FCHR Order No. 07-048 (September 7, 2007).

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 12th day of October, 2007.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam, Panel Chairperson;
Commissioner Shahrukh S. Dhanji; and
Commissioner Anice R. Prosser

Filed this 12th day of October, 2007,
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:

Alicia Hays
c/o Erika E. Goodman, Esq.
Marie A. Mattox, P.A.
310 East Bradford Road
Tallahassee, FL 32303

Department of Children and Family Services and Agency for Persons with Disabilities
c/o Sharon L. Ray, Esq.
3700 Williams Drive
Marianna, FL 32446

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 12th day of October, 2007.

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