

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

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DIVISION OF
ADMINISTRATIVE
HEARINGS

PHILIP PORTER,

EEOC Case No. 15D200603655

Petitioner,

FCHR Case No. 2006-02164

v.

DOAH Case No. 07-1334

DEPARTMENT OF AGRICULTURE AND
CONSUMER SERVICES,

FCHR Order No. 07-065

Respondent.

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

Preliminary Matters

Petitioner Philip Porter filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2005), alleging that Respondent Department of Agriculture and Consumer Services committed an unlawful employment practice on the basis of Petitioner's disability (schizophrenia) and on the basis of Petitioner's age (DOB: 5-4-48) when it failed to hire Petitioner for a position for which he had applied.

The allegations set forth in the complaint were investigated, and, on March 7, 2007, 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 June 15, 2007, in Ocala, Florida, before Administrative Law Judge Ella Jane P. Davis.

Judge Davis issued a Recommended Order of dismissal, dated September 13, 2007.

Pursuant to notice, public deliberations were held on November 27, 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 that "(1) he is disabled; (2) he was a 'qualified individual' at the relevant time, meaning he could perform the essential functions of the job in question with or without reasonable accommodations; and (3) he was discriminated against because of the disability." Recommended Order, ¶ 54. This is similar to the test cited in Brand v. Florida Power Corp., 633 So. 2d 504 (Fla. 1st DCA 1994).

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, 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 did not hire Respondent because it maintains it hired a more qualified candidate - see Recommended Order, ¶ 66), 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 [or, as in this case, Respondent failed to hire Petitioner]. 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) her or she is a qualified individual; and (3) her or she was discriminated against because of his or her disability."

The error in the test to establish a prima facie case used by the Administrative Law Judge is harmless since in both that test and the appropriate test Petitioner must establish that he is handicapped / disabled within the meaning of the law, and the Administrative Law Judge concluded that Petitioner failed to establish this (See Recommended Order, ¶ 55), and since the Administrative Law Judge further concluded that even if a prima facie case of discrimination had been established, Respondent articulated a legitimate nondiscriminatory reason for not hiring Petitioner (Recommended Order, ¶ 66), and there was no showing that this reason was a pretext for discrimination (Recommended Order, ¶ 67).

The Administrative Law Judge concluded that a prima facie case of age discrimination is established "by (1) showing that Petitioner was a member of a protected

age group; (2) was subjected to an adverse employment action; (3) was qualified to do this job; and (4) was replaced or otherwise lost a position to a younger individual.” Recommended Order, ¶ 65.

With regard to the fourth element of the test cited by the Administrative Law Judge, while a showing that Petitioner was replaced by or lost the job to a *younger* individual could be an element of a prima facie case, it has been stated, “Commission panels have long concluded that the Florida Civil Rights Act of 1992, and its predecessor law the Human Rights Act of 1977, as amended, prohibited age discrimination on the basis of any age ‘birth to death.’ See Green v. ATC/VANCOM Management, Inc., 20 F.A.L.R. 314 (FCHR 1997), and Simms v. Niagara Lockport Industries, Inc., 8 F.A.L.R. 3588 (FCHR 1986). A Commission panel has indicated that one of the elements for determining a prima facie case of age discrimination is that Petitioner is treated differently than similarly situated individuals of a ‘different’ age, as opposed to a ‘younger’ age. See Musgrove v. Gator Human Services, c/o Tiger Success Center, et al., 22 F.A.L.R. 355, at 356 (FCHR 1999). The Commission has concluded that, unlike the federal Age Discrimination in Employment Act (ADEA), the age 40 has no significance in the interpretation of the Florida Civil Rights Act of 1992. See Green, supra, at 315.” Williams v. Sailorman, Inc., d/b/a Popeye’s Chicken and Biscuits, FCHR Order No. 04-037 (June 2, 2004). Accord, Downs v. Shear Express, Inc., FCHR Order No. 06-036 (May 24, 2006), and Coffy v. Porky’s Barbeque Restaurant, FCHR Order No. 05-053 (May 18, 2005).

We modify accordingly the conclusions of law regarding the establishment of a prima facie case of age discrimination.

The error in the test used by the Administrative Law Judge to establish whether a prima facie case of age discrimination occurred is harmless given the Administrative Law Judge’s conclusions that Respondent articulated a legitimate nondiscriminatory reason for not hiring Petitioner (Recommended Order, ¶ 66), and there was no showing that this reason was a pretext for discrimination (Recommended Order, ¶ 67).

In modifying these conclusions of law of the Administrative Law Judge relating to both disability and age discrimination, 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)(1), Florida Statutes (2007).

With these 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 letter addressed to the Clerk of the Commission, Denise Crawford, received by the Commission on September 18, 2007. The document contains five numbered exceptions.

Exception 1 takes issue with the Administrative Law Judge's exclusion of Petitioner's exhibit P-1.

While the Administrative Law Judge did initially exclude this exhibit from evidence, at the close of the hearing the Administrative Law Judge specifically offered Petitioner another opportunity to attempt to establish that P-1 should be admitted, and Petitioner declined. See Transcript, page 122, lines 9 through 17.

Exception 1 is rejected.

Exceptions 2 and 3 take issue with the facts found, relating to whether Petitioner was handicapped / disabled within the meaning of the law, and whether Respondent articulated a legitimate, nondiscriminatory reason for not hiring Petitioner.

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). Accord, Bowles v. Jackson County Hospital Corporation, FCHR Order No. 05-135 (December 6, 2005).

Exceptions 2 and 3 are rejected.

Exceptions 4 and 5 take issue with the law applied to decide this case by the Administrative Law Judge.

We have concluded, above, that the Administrative Law Judge's conclusions of law reflect a correct disposition of the matter, with the indicated corrections to the tests for establishing a prima facie case of handicap / disability discrimination and age discrimination.

Exceptions 4 and 5 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 3rd day of December, 2007.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam, Panel Chairperson;
Commissioner Gayle Cannon; and
Commissioner Onelia A. Fajardo

Filed this 3rd day of December, 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:

Philip Porter
Post Office Box 303
Anthony, FL 32617

Department of Agriculture and Consumer Services
c/o Stephen M. Donelan, Esq.
509 Mayo Building
407 South Calhoun Street
Tallahassee, FL 32399-0800

FCHR Order No. 07-065

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Ella Jane P. 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 3rd day of December, 2007.

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

Philip Porter
P.O. Box 303
Anthony, FL 32617
(352) 622-1585

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HUMAN RELATIONS
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Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Subject: Exceptions to Recommended Order DOAH Case No. 07-1334

RE: Philip Porter v. Florida Department of Agriculture and Consumer Services
DOAH Case No. 07-1334. FCHR No. 200602164

Attention: Denise Crawford,

I am submitting the following exceptions to the Judges Recommended Order dated September 13, 2007 in the above referenced matter.

Exception #1.

The Judge erred when she refused to allow Petitioner's exhibit P-1 into evidence as supplement to his testimony regarding his disability (Recommended Order page 7, Paragraph 13)(Endnote #1 page 28).

Under Florida Statute 120-57(c), hearsay evidence can be used to supplement other evidence such as Petitioner's testimony. Also, Division of Administrative Hearings (DOAH) Uniform Rules of Procedure (Chapter 28-106 part I and II, Florida Administrative Code). 28-106.213 Evidence. (3) Hearsay evidence, whether received in evidence over objection or not, may be used to supplement or explain other evidence, but shall not be sufficient in itself to support a finding unless the evidence falls within an exception to the hearsay rule as found in Chapter 90, F.S.

Exception #2.

The Judge erred when on Pages 20, 21, 22 and 23 paragraphs 55 through 61 when she concludes that Petitioner did not establish the first element of a prima facie test of being a person with a disability as defined under the (ADA).

The Petitioner clearly established in his testimony that he had and continues to have an impairment that substantially limits one or more of his major life activities. Additionally, this evidence could have been collaborated if exhibit P-1 would have been allowed to supplement his testimony. Also exhibit P-1 if entered even as a supplement would have established a historic record of the Petitioner's disability.

Exception # 3.

The Judge erred when on Page 26 paragraph 66 and 67 of the Recommended Order she concludes that the Respondent articulated a legitimate non-discriminatory reason for the challenge employment action.

Evidence and testimony showed that Mr. Dwight Poole improperly applied for the position, rendering any qualifications he may possess moot. Showing the Respondents proffered reason to be false is certainly evidence of pretext.

Exception #4.

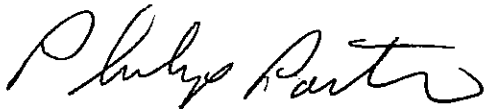
The Judge ignored the Petitioner's argument regarding disparate impact. The ADA clearly prohibits the use of standards, criteria and method of administration that have the effect of discriminating against people with disabilities. The Americans with Disabilities Act, 42 U.S.C. §§ 12101-12213 ("ADA") This argument was clearly outlined in the Petitioner's proposed recommended order submitted to the Judge post-hearing.

Exception #5.

The Judge showed a misunderstanding of (or a bias against) what constitutes a disability and discrimination under the (ADA).

Submitted this 17th day of September, 2007.

Sincerely



Philip Porter
P.O. Box 303
Anthony, FL 32617

cc: Stephen Donelan, Esquire
Florida Department of Agriculture
and Consumer Services
509 Mayo Building
407 South Calhoun Street
Tallahassee, Florida 32399-0800

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