

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

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DIVISION OF
ADMINISTRATIVE
HEARINGS

CAROL TUCKER,

EEOC Case No. 15D20070007A

Petitioner,

FCHR Case No. 2006-02307

v.

DOAH Case No. 07-2655

CHIPOLA COLLEGE,

FCHR Order No. 08-009

Respondent.

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

Preliminary Matters

Petitioner Carol Tucker 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 Chipola College committed unlawful employment practices on the basis of Petitioner's alleged disability when it failed to hire Petitioner for an adjunct instructor position.

The allegations set forth in the complaint were investigated, and, on April 20, 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 August 30, 2007, in Shalimar, Florida, before Administrative Law Judge Susan B. Harrell.

Judge Harrell issued a Recommended Order of dismissal, dated November 2, 2007.

Pursuant to notice, public deliberations were held on January 10, 2008, 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) she is disabled; (2) she is a qualified individual; (3) she was subjected to unlawful discrimination because of her disability." Recommended Order, ¶ 18. 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 of misrepresentations made by Petitioner on her job

application - see Recommended Order, ¶ 22), 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) 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)(1), 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, ¶ 20).

With this correction, we adopt the Administrative Law Judge’s conclusions of law.

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in a 21-page document entitled, "Exceptions to Judge Harrell's Recommended Order and Opposing Counsel's Recommended Order," received by the Commission on November 19, 2007.

The document purports to take issue with parts of both the Administrative Law Judge's Recommended Order and Respondent's Proposed Recommended Order filed with the Administrative Law Judge. Petitioner's exceptions to Respondent's Proposed Recommended Order are of no consequence, in our view, since it is the Commission's responsibility to review the Recommended Order of the Administrative Law Judge, not to review the proposed Recommended Orders of the parties filed with the Administrative Law Judge. See, generally, Barr v. Columbia Ocala Regional Medical Center, 22 F.A.L.R. 1729, at 1730 (FCHR 1999), citing Rathkamp et al. v. Department of Community Affairs, 21 F.A.L.R. 1902, at 1904 (DCA 1998). Accord, Jones v. Suwannee County School Board, FCHR Order No. 06-088 (September 11, 2006).

Consequently, all exceptions to Respondent's Proposed Recommended Order are rejected.

On the first two pages of the exceptions document, Petitioner appears to accept to the assignment of this case to Judge Harrell from Judge Diane Cleavinger prior to the final hearing in the matter.

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." See Section 120.57(1)(a), Florida Statutes (2007).

This exception is rejected.

With regard to the remaining exceptions to the Recommended Order paragraphs, Petitioner's exceptions take issue with [Recommended Order paragraph number, exceptions document page number] facts found (§ 3, page 4; § 6, page 9), facts not found (§ 3, page 5; § 4, page 6; § 5, page 8), and inferences drawn from the evidence presented (§ 8, page 14)-- some exceptions seem to simply provide argument as opposed exception to a specific paragraph of the Recommended Order (§ 9, page 15).

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).

These remaining exceptions are rejected.

Dismissal

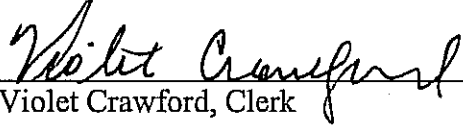
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 14th day of January, 2008.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Anice R. Prosser, Panel Chairperson;
Commissioner Shahrukh S. Dhanji; and
Commissioner Gilbert M. Singer

Filed this 14th day of January, 2008,
in Tallahassee, Florida.


Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, FL 32301
(850) 488-7082

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:

Carol Tucker
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Susan B. Harrell, 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 14th day of January, 2008.

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