

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

SARAH L. SMITH, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 08-1927  
 )  
 CAVALIER TELEPHONE AND TV, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

This cause came on for final hearing before Harry L. Hooper, Administrative Law Judge with the Division of Administrative Hearings, on June 10, 2008, in Pensacola, Florida.

APPEARANCES

For Petitioner: Sarah L. Smith, pro se  
513 North Reus Street  
Pensacola, Florida 32501

For Respondent: Sharon Glover, Esquire  
2134 West Laburnum  
Richmond, Virginia 23227

Lori Y. Baggett, Esquire  
Carlton Fields  
4221 West Bay Scout Boulevard  
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STATEMENT OF THE ISSUE

The issue is whether Respondent engaged in an unlawful employment practice.

PRELIMINARY STATEMENT

Petitioner Sarah L. Smith (Ms. Smith) filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations (Commission) on September 17, 2007. The Complaint alleged that Respondent Cavalier Telephone and TV (Cavalier) discriminated against her based on race and disability/handicap. After investigation the Commission issued a "Determination: No Cause."

Ms. Smith thereafter, on April 11, 2008, filed a Petition for Relief with the Commission. It was forwarded to the Division of Administrative Hearings and filed on April 16, 2008. It was set for hearing in Pensacola, Florida, on June 10, 2008, and heard as scheduled.

During the hearing, Ms. Smith abandoned her claim of racial discrimination. The hearing then focused on Ms. Smith's claim that she was denied reasonable accommodations and was terminated due to her disability in violation of Chapter 760 of the Florida Civil Rights Act and the Americans with Disabilities Act.

At the hearing, Ms. Smith presented the testimony of three witnesses. Cavalier also presented the testimony of three witnesses. Three joint exhibits were received into evidence. A transcript was filed July 3, 2008.

Cavalier, subsequent to being granted an extension, timely submitted a Proposed Recommended Order that was considered in

the preparation of this Recommended Order. Ms. Smith made no post-hearing submissions.

References to statutes are to Florida Statutes (2007) unless otherwise noted.

#### FINDINGS OF FACT

1. Cavalier is in the business of providing various types of telephone services including landline communications, DSL, and Internet TV. They have as many as 150 employees in the Pensacola area and have offices in other locations. Cavalier acquired Talk America, Inc., a predecessor corporation, on April 20, 2006.

2. Ms. Smith began working for Cavalier as a sales representative in December of 2006. As a sales representative for Cavalier, Ms. Smith called potential customers and attempted to sell them services and products provided by Cavalier. She was very successful at this work and was considered to be an excellent employee. Her sales were high, and she was awarded bonuses.

3. On April 19, 2007, Ms. Smith suffered a mini-stroke and was absent from her work until May 2, 2007. At that time, she assumed that she had recovered and reported for work. Her supervisor, Floor Manager Cassandra Pressley, and fellow employees were happy to see her return. To celebrate her

return, Ms. Pressley and other employees contributed money that was used to buy flowers for Ms. Smith.

4. As the day progressed, Ms. Pressley noticed Ms. Smith slumped over in her chair and was concerned. Ms. Pressley offered her extra breaks, but Ms. Smith refused her entreaties. Eventually, Ms. Smith became clearly unwell, and with Ms. Pressley's encouragement, she departed with a co-worker who followed her home.

5. On May 2, 2007, Ms. Smith learned from her doctor that she would have to take, or continue with, medical leave. When Ms. Pressley became aware of this, she caused Ms. Smith to communicate with Suzanne Altare, Cavalier's director of human relations for the southeast area. Ms. Altare explained Cavalier's company leave policy.

6. Ms. Altare informed Ms. Smith that she was ineligible for leave pursuant to the Family Medical Leave Act because she had been employed with the company for less than a year. Nevertheless, Ms. Altare told Ms. Smith that she could have eight weeks of unpaid discretionary leave. This leave became effective May 2, 2007. Ms. Altare's actions complied with Cavalier's Employee Handbook. The Employee Handbook requires equal treatment of all employees.

7. Subsequent to May 2, 2007, Ms. Pressley and Ms. Altare both checked in with Ms. Smith by telephone on more than one

occasion to see how she was doing and inquired if her doctor was going to provide her with a release so that she might return to work at the end of the eight-week leave.

8. On or about July 5, 2007, in the ninth week of her absence, both Ms. Pressley and Ms. Altare communicated with Ms. Smith by telephone. Ms. Smith informed them that her doctor had not released her for return to employment. Since she could not provide an estimated time of return, she was terminated.

9. Because Ms. Smith was an especially valued employee, Ms. Altare informed her that she would process her termination as voluntary so that when she was physically able, she could return to work at Cavalier. This coincided with what Cavalier had done with other employees who had to stop working temporarily due to an illness. At least one of those had in fact returned upon receiving a release from her doctor.

10. No evidence was adduced by any witness that Ms. Smith either complained of discrimination or requested an accommodation.

11. In September 2007, Ms. Pressley was asked by a person identified as Ms. Smith's husband to help Ms. Smith at a check-cashing facility that was located close to the Cavalier workplace. Ms. Pressley went with him to the check-cashing facility. Ms. Smith approached Ms. Pressley and hugged her.

Ms. Pressley inquired as to when Ms. Smith would return. She told Ms. Pressley that she had not been released by her doctor.

12. Ms. Smith testified that she received "disability payments" until December 16, 2007, when her doctor informed her that she could go back to work. Ms. Smith testified, "I figured they would rehire me, anyway, because of my good sales, yes, sir." However, at least up until the time of the hearing, Ms. Smith had not asked to return to her job.

#### CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter of and the parties to this proceeding. §§ 120.57(1) and 760.11, Fla. Stat.

14. Sections 760.01-760.11 and 509.092, Florida Statutes, are known as the "Florida Civil Rights Act of 1992." § 760.01(1), Fla. Stat.

15. Cavalier is an "employer" pursuant to Subsection 760.02(7), Florida Statutes.

16. Pursuant to Subsection 760.10(1)(a), Florida Statutes, it is an unlawful employment practice for an employer to discharge or to fail or refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's "handicap." Handicap is a synonym for disability.

17. Federal employment discrimination law, including disability discrimination law, can be used for guidance in construing the provisions of Chapter 760, Florida Statutes. Chanda v. Englehard/ICC, 234 F.3d 1219, 1221 (11th Cir. 2000), and Fouraker v. Publix Supermarket, Inc., 959 F. Supp. 1504, 1510-11 (M.D. Florida 1997).

18. A petitioner in a disability discrimination case has the initial burden of proving a prima facie case of discrimination under the ADA by demonstrating that: (1) she has a disability under the Florida Civil Rights Act and the ADA; (2) that she is a qualified individual, which means that she is able to perform the essential functions of the employment position with or without accommodation; and, (3) that the respondent unlawfully discriminated against her because of her disability. See McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

19. The Americans with Disabilities Act, identifies three types of "disability" that place an individual within the statute's protections: "The term 'disability' means, with respect to an individual: (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual; (B) a record of such an impairment; or (C) being regarded as having such an impairment." 42 U.S.C. § 12102(2).

20. Factors to consider when determining whether an individual is "substantially limited" include: (1) the nature and severity of the impairment; (2) the duration or expected duration of the impairment; and (3) the permanent or long-term impact, or the expected permanent or long-term impact of or resulting from the impairment. 29 C.F.R. § 1630.2(j)(2).

21. An impairment's minor interference in major life activities does not qualify as a disability. See Toyota Motor Mfg., Ky., Inc. v. Williams, 534 U.S. 184 (2002) and Kelly v. Drexel University, 94 F.3d 102 (C.A. 3d 1996).

22. Ms. Smith offered no proof that she was disabled. To the contrary, the evidence demonstrated clearly that she was able to conduct major life activities without any accommodation. The evidence demonstrated that she was ill and that eventually she recovered. Her medical condition was not permanent. Accordingly, it is found as a matter of law that she was not disabled.

23. Ms. Smith was unable to satisfy the second prong of the test for disability discrimination because she did not demonstrate that she was a qualified individual able to perform the essential functions of the position with or without an accommodation. 42 U.S.C § 12111(8). Attendance was an essential function of the position, and Ms. Smith not only was



unable to work, she could not provide a definitive date of return.

24. Even if one assumes Ms. Smith proved she had an ADA-covered disability, there was no evidence that she was treated differently from her co-workers. She was not "regarded as disabled." Moreover, Ms. Smith never requested accommodations for herself.

25. With regard to the third prong, Ms. Smith did not experience an adverse employment decision. She was treated with great respect and courtesy by Cavalier. She was given leave that Cavalier was not required to give. She was advised many times that she could return when she was physically able.

26. Because Ms. Smith failed to prove a prima facie case, Cavalier was under no obligation to prove a nondiscriminatory reason for Ms. Smith's departure. Nevertheless, Cavalier did prove that Ms. Smith was treated like other employees who suffered illnesses and would have welcomed her back had she been released by her physician and requested reinstatement. In summary, Petitioner failed to establish a prima facie case of discrimination based upon disability. Consequently, the charges against Respondent should be dismissed.

RECOMMENDATION

Based upon the Findings of Fact and Conclusions of Law,  
it is

RECOMMENDED that the Florida Commission on Human Relations  
dismiss the Petition for Relief filed by Sarah L. Smith.

DONE AND ENTERED this 28th day of July, 2008, in  
Tallahassee, Leon County, Florida.



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HARRY L. HOOPER  
Administrative Law Judge  
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Filed with the Clerk of the  
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this 28th day of July, 2008.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.