

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

SHERI L. MCINTOSH,

Petitioner,

v.

DOLLAR GENERAL,

Respondent.

2008 MAY 26 A 11:19

DIVISION OF
ADMINISTRATIVE
HEARINGS

EEOC Case No. 15D200800588

FCHR Case No. 2008-01650

DOAH Case No. 08-6258

FCHR Order No. 10-047

**FINAL ORDER AWARDING AFFIRMATIVE
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

Preliminary Matters

Petitioner Sheri L. McIntosh filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2007), alleging that Respondent Dollar General committed unlawful employment practices by discriminating against Petitioner on the on the basis of Petitioner's disability / handicap and on the basis of retaliation. At hearing, the issue was narrowed to allegations that Respondent failed to provide a reasonable accommodation for Petitioner's handicap / disability.

The allegations set forth in the complaint were investigated, and, on October 23, 2008, the Executive Director issued his determination finding that there was 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 December 16, 2009, in Bronson, Florida, before Administrative Law Judge Harry L. Hooper.

Judge Hooper retired prior to the filing of the transcript of the hearing and the case was transferred to Administrative Law Judge Robert S. Cohen for the issuance of a Recommended Order. Judge Cohen issued a Recommended Order, dated March 4, 2010, recommending that the Commission find that an unlawful employment practice occurred and recommending affirmative relief.

The Commission panel designated below considered the record of this matter and 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.

We adopt the Administrative Law Judge's conclusions of law.

Respondent's Exceptions

Respondent filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Respondent's Exceptions to the Administrative Law Judge's Recommended Order." The document contains 19 numbered exceptions to the Recommended Order.

Exceptions numbered 1, 2, 3, 4, 5, 6, 7, 8, 10, 11, 12, 13, 14, 15, 17 and 19 take issue with facts found and inferences drawn from the evidence presented. We have found the Administrative Law Judge's findings of fact to be supported by competent substantial evidence and the Administrative Law Judge's conclusions of law to result in a correct disposition of the matter. We also note that it has been stated, "The ultimate question of the existence of discrimination is a question of fact." Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205, at 1209 (Fla. 1st DCA 1991). Accord, Coley v. Bay County Board of County Commissioners, FCHR Order No. 10-027 (March 17, 2010).

These exceptions are rejected.

Exception 9 excepts to the Administrative Law Judge's determination to admit Petitioner's exhibit 1 into evidence as relevant to the issue of showing the time frame for Petitioner's injuries and to the issue of what damages, if any, should be awarded in this matter. No damages have been awarded in this matter.

This exception is rejected.

Exception 16 excepts to the issuance of the Recommended Order by an Administrative Law Judge who did not hear the 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 (2009). While the substitution of a new Administrative Law Judge after the conduct of the hearing arguably gives the Commission the authority to conduct a de novo review of the record since, having not heard the witnesses or observed their demeanor, the Administrative Law Judge who prepared the Recommended Order would be in no better position to review

the record and make findings of fact and conclusions of law than the Commission (see Lucas v. Department of Children and Family Services, FCHR Order No. 07-023 (March 12, 2007) citing Jacobs v. Florida Department of the Lottery, 20 F.A.L.R. 360, at 361 (FCHR 1996); see also Jones Management Corporation v. Department of Environmental Protection, 16 F.A.L.R. 1315, at 1319 (DEP 1994)), the substituted Administrative Law Judge has the authority and responsibility under the Administrative Procedure Act to issue a Recommended Order in the matter. Accord, Seiden v. Wexford Health Sources, Inc., FCHR Order No. 07-024 (March 27, 2007).

This exception is rejected.

Exception 18 excepts to any award of fees to the Petitioner, arguing that Petitioner is not a "prevailing party." We do not agree that Petitioner is not a prevailing party. This order finds that an unlawful employment practice has occurred and directs Respondent to cease and desist from discriminating further in the manner it has been found to have unlawfully discriminated against Petitioner. See Section 760.11(6), Florida Statutes (2009) directing that when an unlawful employment practice has occurred an order be issued prohibiting the practice.

This exception is rejected.

Petitioner's Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Exceptions to Recommended Order Dated March 4, 2010." The document was filed with the Division of Administrative Hearings instead of with the Commission, and the document does not contain a certificate of service indicating service on Respondent. Nevertheless, Respondent has been made aware of this document as evidenced by Respondent's responsive filing to the document entitled, "Respondent's Response to Petitioner's Exceptions to Recommended Order Dated March 4, 2010."

Petitioner's exceptions document appears to contain two exceptions. First, the document excepts to the Administrative Law Judge's failure to award Petitioner compensatory and punitive damages. Second, the document excepts to the Administrative Law Judge's failure to award compensation for medical bills incurred as a result of Respondent's failure to accommodate Petitioner's disability / handicap.

With regard to compensatory and punitive damages, in conclusions of law adopted by a Commission Panel it has been stated, "Compensatory and punitive damages are not available in this administrative proceeding. Those remedies are only available in a civil action brought pursuant to Section 760.11(4)(a)." See Williams v. Sailorman, Inc., d/b/a Popeye's Chicken and Biscuits, FCHR Order No. 04-037 (June 2, 2004), adopting conclusions of law set out in the Recommended Order of DOAH case number 02-3995, dated August 15, 2003, at paragraph 79.

Petitioner's exception to the Administrative Law Judge's failure to recommend the Commission award compensatory and punitive damages is rejected.

With regard to compensation for medical bills incurred as a result of Respondent's failure to accommodate Petitioner's disability / handicap, we agree with Petitioner that this would be a remedy within the authority of the Commission to order. Nevertheless, the record before the Commission does not establish that the medical bills in question were incurred as a result of Respondent's failure to accommodate Petitioner's disability / handicap.

Petitioner's exception to the Administrative Law Judge's failure to award compensation for Petitioner's medical bills is rejected.

Affirmative Relief

Through our adoption of the Administrative Law Judge's findings of fact and conclusions of law, as set out above, we find that unlawful disability / handicap-based discrimination occurred in this matter in the manner found by the Administrative Law Judge and have adopted the Administrative Law Judge's recommendations for the remedy of the discrimination.

Respondent is hereby ORDERED:

(1) to cease and desist from discriminating further in the manner it has been found to have unlawfully discriminated against Petitioner;

(2) to pay Petitioner attorney's fees that have been reasonably incurred in this matter by Petitioner; and

(3) to pay Petitioner the amount of costs that has been reasonably incurred in this matter by Petitioner.

The Commission reserves jurisdiction over the determination of attorney's fees and costs awarded Petitioner.

If, within 30 days of the date of the filing of this order by the Clerk of the Commission, the parties have agreed to the amounts of attorney's fees and costs owed Petitioner, the parties shall prepare and submit to the Commission a Joint Stipulation of Settlement.


If, within 30 days of the date of the filing of this Order by the Clerk of the Commission, the parties are unable to reach agreement as to amounts of attorneys fees and costs owed Petitioner, Petitioner is directed to file with the Commission a Notice of Failure of Settlement, and the case will be remanded to the Administrative Law Judge for determination of the appropriate attorney's fees and costs owed Petitioner in this matter, as ordered above.

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 25th day of May, 2010.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam, Panel Chairperson;
Commissioner Gilbert M. Singer; and
Commissioner Darcell Streeter

Filed this 25th day of May, 2010,
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 200
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:

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c/o Melanie A. Mucario, Esq.
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Dollar General
c/o Alva Cross Hughes, Esq.
Fisher & Phillips, LLP
401 East Jackson Street, Suite 2525
Tampa, FL 33602

Robert S. Cohen, 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 25th day of May, 2010.

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