

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL OLACIREGUI,)
)
 Petitioner,)
)
 vs.) Case No. 09-2963
)
 FLORIDA HIGHWAY PATROL,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This case came before Administrative Law Judge June C. McKinney of the Division of Administrative Hearings for final hearing on September 15, 2009, by video teleconference at sites in West Palm Beach, Florida, and Tallahassee, Florida.

APPEARANCES

For Petitioner: Cathleen Scott, Esquire
Cathleen Scott, P.A.
Jupiter Gardens
250 South Central Boulevard, Suite 104-A
Jupiter, Florida 33458

For Respondent: Sandra Coulter, Esquire
Florida Highway Patrol
Neil Kirkman Building
2900 Apalachee Parkway, A432
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent unlawfully discriminated against Petitioner by terminating his employment

in violation of the Florida Civil Rights Act of 1992, as amended.

PRELIMINARY STATEMENT

In an Unlawful Employment Practice Complaint filed on or about May 27, 2009, and subsequently investigated by the Florida Commission on Human Relations (hereinafter "Commission") Michael Olaciregui (hereinafter "Olaciregui" or "Petitioner") charged that the Florida Highway Patrol (hereinafter "FHP" or "Respondent") unlawfully discriminated against Petitioner by terminating his employment because of his medical condition involving low testosterone.

The Commission investigated Petitioner's claim and on April 22, 2009, issued a Notice of Determination: No Cause setting forth its determination that reasonable cause did not exist to believe that an unlawful employment practice occurred. Thereafter, Petitioner filed a Petition for Relief, which the Commission sent to the Division of Administrative Hearings (hereinafter "DOAH") on May 29, 2009.

At the final hearing, Olaciregui testified on his own behalf and Petitioner's Exhibits 1 through 2 were offered and admitted in evidence. Respondent offered Exhibits 1 through 3 and the three exhibits were received into evidence. On October 5, 2009, the Transcript of the proceeding was filed with

the DOAH. Both parties filed timely Proposed Recommended Orders, which have been duly considered.

Unless otherwise indicated, citations to the Florida Statutes refer to the 2009 Florida Statutes.

FINDINGS OF FACTS

1. Olaciregui was employed as a road patrol trooper with FHP. His work schedule typically consisted of a 40-hour shift. Petitioner worked an average of 16-to-24 additional hours per week because he needed the income to survive, which made him tired. Petitioner never told his employer he was tired.

2. On or about January 26, 2004, Petitioner decided to seek medical attention for his fatigue and lack of sex drive. He went to PowerMedica, a clinic.

3. At PowerMedica, Olaciregui filled out a Confidential Medical History Form regarding his medical history. Petitioner did not answer the questions on the form accurately. He did not disclose his medical problems, and he put on the form that he had no problems. On question number 32, he checked "no" for decreased sexual potency.

4. After meeting with the doctor, Petitioner was provided a prescription to obtain a blood test. The prescription contained the address of a physician located in New York. Petitioner had his blood drawn at LabCorp of America, a separate and unaffiliated business from PowerMedica.

5. Petitioner had his blood work done at LabCorp and returned to PowerMedica to get the results. Petitioner met with Dr. Almarashi and went over the blood-work results. He was informed that his testosterone levels were below average. Petitioner's results were 129 above the bottom end of the range at a level of 370. The top of the normal range is 827, and the low end of the normal range is 241. No additional evidence was provided to support Petitioner's allegation of low testosterone.

6. Petitioner decided to follow the treatment plan the doctor provided him after he was told he had low testosterone and take prescription medication. The PowerMedica doctor gave Petitioner a prescription that he could not fill at Walgreens or CVS but that could only be filled in the PowerMedica pharmacy.

7. Petitioner did not question the prescriptions or ask anything about them. PowerMedica visits and the prescription medications were not covered under Petitioner's health insurance. His initial bill totaled approximately \$1,529.95, but he purchased and used all the medications, including three controlled substances that were anabolic steroids. Petitioner did not report his medical treatment to FHP.

8. On or about June 8, 2004, Petitioner was hit by a car and FHP placed him on workers' compensation. Petitioner was under a doctor's care while receiving workers' compensation but never advised the doctor about the medications he was taking

from PowerMedica. He also failed to disclose to the workers' compensation doctor that he was being treated for any other medical conditions.

9. In June 2004, Petitioner went back to the clinic for a follow-up visit. He obtained additional medication, which he took.

10. When Petitioner stopped his treatment at PowerMedica, it was because he could no longer afford it.

11. During treatment and after leaving PowerMedica, Petitioner never voluntarily informed FHP that he lacked a sex drive, that he was tired, or what his testosterone level was because he was embarrassed and felt the issue was private.

12. Approximately four years after Petitioner stopped going to PowerMedica, a FHP lieutenant provided Petitioner a document explaining that he was under investigation. The investigation stemmed from the U.S. Food and Drug Administration's (USFDA) closing down PowerMedica for unlawfully selling steroids and Human Growth Hormones. USFDA provided Petitioner's medical records seized by search warrant from PowerMedica to Lieutenant Paul Sharp and Sergeant Mark Shoaff, the two internal affairs officers assigned to investigate the matter.

13. On or about July 2, 2008, Petitioner provided statements to Lieutenant Sharp and Sergeant Shoaff regarding the

investigation. During his interview, Petitioner was questioned about PowerMedica, Dr. Almarashi, and the treatment he received at the clinic. Petitioner admitted to the investigators filling his PowerMedica medical prescriptions for steroids and taking nandrolone decanoate, oxymetholone, and stanozole, which were controlled substances.

14. Petitioner also finally disclosed his medical condition to FHP during the interview and told the investigators that he "had severe aches and pains, low testosterone and [he was] lacking a sex drive."

15. After the investigation was complete, FHP by letter dated September 4, 2008, informed the Petitioner that the Department was proposing to dismiss him from his position as a Law Enforcement Officer with FHP.

The FHP Investigation Report states:

Trooper Michael Olaciregui admitted that he purchased and used controlled substances from PowerMedica in 2004. Olaciregui further admits and PowerMeidca's records confirm, that he made his first purchase of controlled substances, syringes and needles on January 26, 2004 for \$1529.95 (Exhibit #3). The purchase is confirmed by a credit card receipt signed by Olaciregui on January 26, 2004 and the prescriptions were filled and dated on January 26, 2004. The records also indicated that this purchase and the receipt of these controlled substances by Olaciregui on January 26, 2004 was done four (4) days prior to him going to LabCorp (Exhibit #4) and submitting his blood for analysis on January 30, 2004.

Records further indicate that he made other purchases from PowerMedica for controlled substances on April 16, 2004, June 14, 2004, June 28, 2004 and on July 6, 2004.

16. Petitioner requested a predetermination conference that was held on October 27, 2008. FHP determined that no additional facts were presented to change the disciplinary action and that the termination as a disciplinary action was warranted.

17. On January 14, 2009, FHP provided Olaciregui a termination letter that provided factual allegations of the investigation and the following violations as grounds for termination:

* * *

1. Section 893.13(6) (a) Florida Statutes, Possession of a controlled substance without a valid prescription, 3rd Degree Felony;

2. Florida Highway Patrol Policy Manual, Chapter 3.03.06(A) 7. Code of Conduct states: "Members will maintain a level of moral conduct in their personal and business affairs which is in keeping with the highest standards of the law enforcement profession;"

3. Florida Highway Patrol Policy Manual, Chapter 3.03.06(a) 51. Code of conduct states: "Members will not possess or use cannabis or any controlled substances except when prescribed by law and Division directives";

4. Florida Highway Patrol Policy chapter 5.11.05, Substance Abuse.

These violations constitute the following disciplinary offenses:

1. Possession, Sale, Transfer or Use of Drugs Off the Job, first offense;

2. Violation of Statutory Authority, rules, Regulations or Policies, Fourth Offense;

3. Conduct Unbecoming a Public Employee, first offense.

18. After approximately 12 years of employment, FHP terminated Petitioner's employment on January 14, 2009, for using controlled substances that he received from PowerMedica in 2004.

CONCLUSIONS OF LAW

19. The DOAH has jurisdiction over the subject matter of this proceeding and of the parties pursuant to Sections 120.569 and 120.57(1), Florida Statutes (2009).

20. The Florida Civil Rights Act of 1992 (Florida Act) is codified in Sections 760.01 thorough 760.11, Florida Statutes, and Section 509.092, Florida Statutes. § 760.01(1), Fla. Stat.

21. A "discriminatory practice," as defined in the Florida Act, "means any practice made unlawful by the Florida Civil Rights Act of 1992." § 760.02(4), Fla. Stat.

22. Section 760.01 of the Florida Act explains that the general purpose of the Act is to:

. . . [S]ecure for all individuals within the state freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest in personal dignity, to make available to the sate their full productive capacities, to secure the state against domestic strife and unrest, to preserve the public safety, health, and general welfare, and to promote the interests, rights, and privileges of individuals within the state." (Emphasis added.)

23. Section 760.10, Florida Statutes, provides, in relevant part:

(1) It is an unlawful employment practice for an employer:

(a) To discharge or to fail or refuse to hire an individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, national origin, age, handicap, or marital status.

24. The Americans with Disabilities Act of 1990(ADA), 42 U.S.C.S. Section 12102(1), provides, in pertinent part, the following definition of the term "disability":

(1) Disability. The term "disability" means, with respect to an individual--

(A) a physical or mental impairment that substantially limits one or more major life activities of such individual;

(B) a record of such an impairment; or

(C) being regarded as having such an impairment

25. The ADA defines major life activities, in relevant part, to include, but not limited to, caring for oneself,

performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working. 42 U.S.C.S. § 12102(2)(A)(1).

26. Disability discrimination claims under the Florida Act are analyzed under the same framework as the ADA claims. D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220 (11th Cir. 2005). Thus, the provisions of Chapter 760, Florida Statutes, are analogous to those of the ADA.

27. To prevail in this proceeding under either the Federal or Florida Act, a petitioner in a disability discrimination case has the initial burden of proving a prima facie case of unfair employment action within the framework set forth in McDonnell Douglas Corp. v. Green, 411 U. S. 792 (1973).

28. In order for a petitioner to establish a prima facie case of discrimination in violation of either of the Acts¹ Petitioner must prove (1) he has a disability; (2) that he is a "qualified individual", meaning he is able to perform the essential functions of the position; and (3) the alleged discrimination action against Petitioner was the result of unlawful discrimination based of a disability. See Hansen v. Smallwood, Reynolds, Stewart, Stewart & Assocs., 119 F. Supp. 2d 1296.

29. Petitioner failed to prove he suffers from a disability within the meaning of both Acts. Olaciregui did not attempt to persuade FHP during his employment that he was disabled, and he was not regarded as a disabled employee. Moreover, Olaciregui failed to offer any persuasive evidence at the hearing that he was disabled as defined by the Acts. Petitioner's testosterone level of 370, lack of sex drive and fatigue do not limit his ability to perform any life activities contemplated under the Acts, and therefore Petitioner was unable to satisfy the first prong of the test for disability discrimination because he did not demonstrate that he was disabled.

30. Petitioner asserts that the undersigned should evaluate whether Olaciregui is disabled by focusing on the reason the adverse action took place rather than on the specifics of a person's physical or mental condition regarding the analysis of ADA law. Under such analysis, the undersigned still finds that Petitioner failed to demonstrate that an adverse action took place based on a disability.

31. Further, even if one were to conclude that Petitioner was disabled, proof of the third prong, that Olaciregui was discharged because of a disability, was also entirely absent in this matter. The record demonstrates that the discharge was based on Petitioner's violating FHP's policies with his use of

controlled substances and was not at all motivated by any discrimination based on disability.

32. Based on the Finding of Facts herein and a consideration of the totality of circumstances, there is insufficient evidence that Respondent took any action against Petitioner because of his alleged but unproven disability. Petitioner failed to establish that Respondent committed an unlawful employment practice against him within the Acts. Accordingly, Petitioner's failure to establish a prima facie case of discrimination ends any further inquiry regarding this case.

33. Petitioner also asserts allegations regarding FHP's violating HIPPA in retrieving Petitioner's medical records and whether FHP had just cause to terminate Petitioner's employment. The first issue is not within the undersigned's jurisdiction to determine. The second issue need not be addressed because Petitioner failed to present a prima facie case.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing Petitioner's Petition for Relief.

DONE AND ENTERED this 23rd day of November, 2009, in
Tallahassee, Leon County, Florida.

June C. McKinney

JUNE C. MCKINNEY
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 23rd day of November, 2009.

ENDNOTE

^{1/} For ease of reference, the Florida Civil Rights Act of 1992 will be referred to as the Florida Act and the Americans with Disabilities Act of 1990 will be referred to as the ADA. Collectively, they will be referred to as the Acts.

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.