

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MICHAEL JEFFRIES,)
)
 Petitioner,)
)
 vs.) Case No. 09-3100
)
 FLORIDA HIGHWAY PATROL,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

A formal administrative hearing was conducted, as previously scheduled, by video teleconference at sites in Lauderdale Lakes and Tallahassee, Florida, on October 2 and 21, 2009, before Administrative Law Judge Eleanor M. Hunter of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Cathleen Scott, Esquire
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For Respondent: Sandra Coulter, Esquire
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STATEMENT OF THE ISSUE

Whether Respondent unlawfully discriminated against Petitioner by terminating his employment in violation of the Florida Civil Rights Act of 1992, as amended, as alleged in the Petition for Relief.

PRELIMINARY STATEMENT

Petitioner filed with the Florida Commission on Human Relations (FCHR) a Charge of Discrimination against Respondent, dated November 14, 2008. On April 30, 2009, after it completed its investigation, the FCHR issued a "Notice of Determination: No Cause." Petitioner challenged that determination by filing a Petition for Relief dated June 4, 2009.

Alleging a violation of the Florida Civil Rights Act of 1992, as amended, the Petition for Relief states, in relevant part, that:

My public employer, Florida Highway Patrol ["FHP"] improperly considered my medical condition in terminating my employment. In particular, the FHP made a value judgment on the legitimacy of my medical condition and treatment. Although I received a lawful prescription [for anabolic steroids, Schedule III substances,] and filled my prescription at a pharmacy licensed in the State of Florida, the FHP terminated my employment for allegedly possessing an unlawful prescription. There is no evidence that I obtained anything other than lawful FDA approved treatment for a bona fide medical condition.

In addition, FHP disclosed my medical condition to the public by placing medical information and records in my personal file. My employer violated the Florida Civil Rights Act, Fla Stat §760 and the Americans With Disabilities Act,

as amended by wrongfully terminating my employment and attaching a negative and unlawful stigma to the nature of my medical condition. I and other officers have been terminated based on the employer's view of our medical treatment as unconventional. I have been subjected to a number of harassing comments about my condition including being called derogatory names such as "drug dealer" and "juicehead."

At all times I was under a doctor's care and [had a] prescription for my medical condition. The Department did not have me drug tested or allege that they had any reasonable suspicion about my performance. To the contrary, the Department only learned about my medical condition by illegally obtaining my medical records from the Broward County Sheriff's Office on an unrelated investigation. FHP confiscated my medical files without lawful subpoena or a release.

Petitioner is separately pursuing a proceeding in which the Public Employees Relation Commission (PERC) determined that Petitioner lawfully obtained the anabolic steroids and that Respondent was not justified in terminating his employment. The PERC order is on appeal and has been stayed by the District Court of Appeal for the First District of Florida. It is not the purpose in this case to determine whether Petitioner acted lawfully, but whether Respondent acted unlawfully by discriminating against Petitioner.

At the final hearing, on October 2, 2009, Petitioner testified on his own behalf. Petitioner's Exhibits 1-4, 9 (pages 1-5), 11, and 13 (page 3) were received into evidence.

Respondent also called Petitioner as a witness in its case-in-chief. Respondent's Exhibits A1 (71 pages), A4, and A5 were received into evidence.

Because one of Petitioner's witnesses was unavailable on October 2, 2009, the day scheduled for the hearing, and over the objection of Respondent's counsel, the case was reconvened on October 21, 2009, to allow Petitioner to present the testimony of Carlos G. Levy, M.D.

The two-volume Transcript was filed on November 10, 2009. Proposed Recommended Orders, filed by Petitioner on November 13, 2009, and by Respondent on November 17, 2009, have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner, Michael Jeffries, was employed as a trainee, then as a trooper by the Florida Highway Patrol (FHP) from August 5, 1991, to January 30, 2009.

2. During that time, Petitioner received a written reprimand in 1985 for "failure to perform job duties" and was suspended for 40 days in 1997 because his drivers' license was about to be suspended.

3. In 2004, Petitioner had symptoms of fatigue, low sex drive, and difficulty sleeping.

4. Petitioner read an advertisement, as he remembers, in a muscle and fitness magazine, for PowerMedica, a facility that

listed itself as a provider of hormone replacement therapy (HRT) that could alleviate fatigue and low sex drive.

5. Petitioner visited the offices of PowerMedica which appeared to be a typical medical office in a multi-story office building. Petitioner has learned in retrospect that, as it appeared, in April 2004, PowerMedica held a valid State of Florida license as a medical facility, a pharmacy. He asked the receptionist for information about PowerMedica, she gave him a brochure, and he left.

6. Petitioner next consulted his primary care physician, Carlos G. Levy, M.D. Dr. Levy was unable to recall if he saw Petitioner for specific complaints or for his annual physical. Petitioner's blood was drawn in Dr. Levy's office and sent to LabCorp for testing on April 28, 2004. Dr. Levy reviewed the results of the test with Petitioner and diagnosed him as having hypogonadism, a condition manifested by a low testosterone level of 201, or any level below 300, according to Dr. Levy, although the test results form indicated that 241 to 827 is the normal range. By either standard, Petitioner was, according to Dr. Levy, hypogonatic and his condition should have been treated to avoid more serious health problems.

7. Dr. Levy is board certified in osteopathic family medicine. As a part of his regular practice, he treats patients with low testosterone, usually beginning with topical

preparations. His patients have monthly blood tests and, if the topical testosterone is not being absorbed adequately, he uses testosterone injections. Despite having diagnosed his condition, Dr. Levy did not treat Petitioner.

8. Rather than seeking treatment from Dr. Levy, Petitioner made a second visit to the PowerMedica office. This time Petitioner filled out a confidential medical questionnaire. On the form, he indicated that he had no decrease in sexual potency and no sleep disturbances, or any other medical conditions. He testified that he was embarrassed to put low testosterone, or his symptoms on the form that would be seen by the receptionist and others in the office, but that he did tell a gentleman in a white lab coat in a private room at PowerMedica about his condition. He also gave that gentleman a copy of his blood tests results and was advised that his records would be reviewed by a doctor. He did not believe that the gentleman or anyone else that he personally met at PowerMedica was a doctor.

9. Approximately a week later, Petitioner received a telephone call from someone he believed to be a doctor or someone who was calling for a doctor at PowerMedica. That person said his records had been reviewed, and he could get prescriptions from, and could get them filled at, PowerMedica.

10. On his third visit to PowerMedica, Petitioner received four prescriptions, dated June 11, 2004, all signed by a Dr. Al

Almarashi, whom he had never met. The prescriptions were filled at PowerMedica. Petitioner received two anabolic steroids: Stanozolol and Nandrolone Decanoate; a human chorionic gonadotropin, Novarel, that is used to stimulate testosterone and sperm production; and Clomiphene, an anti-estrogen drug.

11. Petitioner testified that Dr. Levy was aware that he was seeking HRT for low testosterone from another facility. Dr. Levy denied that he was ever advised that Petitioner had purchased and used Stanozolol and Nandrolone. He did not recall being told that Petitioner had purchased and used Novarel or Clomiphene. According to his medical notes, Dr. Levy did not see Petitioner again after April 2004 until September 8, 2005.

12. Petitioner became aware that State and federal agencies were investigating PowerMedica and stopped buying their controlled substances, but he did not notify his employer of his connection to the pharmacy nor did he offer to assist with the investigation. The Broward County Sheriff's Department, in cooperation with the Food and Drug Agency (FDA), determined that Dr. Almarashi was not a Florida-licensed physician and could not lawfully write prescriptions in Florida, and that PowerMedica was selling controlled substances to people without appropriate examinations and documentation of any related medical conditions. As a result, the State suspended its license and the FDA closed PowerMedica. The Sheriff's Department obtained

the PowerMedica customers' list and gave law enforcement agencies the names of any of their law enforcement officers whose names were on the list.

13. Because his name was on the list, Petitioner was investigated by Respondent. He was notified in a letter dated January 14, 2009, that his employment was terminated for the following reasons:

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.

14. Based on his own testimony, Petitioner tried to tell FHP investigators that he had a legitimate medical condition and they refused to believe him. In fact, their report disputes Dr. Levy's diagnosis by asserting that the blood test showed "low testosterone serum but not low free testosterone." The report also faults Petitioner for not being suspicious and for not holding himself to a higher standard as a law enforcement officer who would be aware of the stigma attached to the purchase and use of controlled substances, not as alleged by Petitioner that there was a "stigma" of actually having the condition. The investigators concluded Petitioner knew he was purchasing controlled substances illegally, in part, because (1) they concluded that he really did not have any related medical condition, (2) he was not treated by his primary care doctor who diagnosed what he claimed was a condition, (3) he had no valid doctor-patient relationship with PowerMedica, and (4) he did not come forward with information about his connection to PowerMedica when he became aware of a law enforcement investigation.

15. Taken as a whole, the evidence supports a finding that Respondent terminated Petitioner's employment because its investigators decided, correctly or incorrectly, that Petitioner

knew or should have known that he unlawfully purchased and consumed Schedule III controlled substances.

CONCLUSIONS OF LAW

16. The DOAH has jurisdiction over the subject matter and parties to this case. See §§ 760.11(7), 120.569, and 120.57(1), Fla. Stat. (2009).

17. The Florida Civil Rights Act of 1992, as amended, is codified in Sections 760.01 through 760.11, Florida Statutes (2009). § 760.01(1), Fla. Stat. (2009).

18. A "discriminatory practice" is a practice made unlawful by the Florida Civil Rights Act of 1992." § 760.02(4), Fla. Stat. (2009).

19. Section 760.10, Florida Statutes (2009), 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. (Emphasis Added)

20. "Handicap" has been equated to "disability" and, in the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C.S. Section 12102(1), the term "disability" is defined, in relevant part, as follows:

- (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

21. 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).

22. In order for a petitioner to establish a prima facie case of discrimination in violation of either of the act, 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 on a disability. See Hansen v. Smallwood, Reynolds, Stewart, Stewart & Assocs., 119 F. Supp. 2d 1296.

23. For purposes of this analysis, it is assumed, arguendo, that Respondent's findings were incorrect and that Petitioner has a disability, low testosterone levels or hypogonadism.

24. The second prong of the test, that Petitioner is able

to perform in his position, is also assumed in the absence of evidence to the contrary.

25. What Petitioner has failed, however, to prove is that Respondent terminated him because he had a disability.

26. The initial burden of proving a prima facie case of discrimination having not been met, although not required to do so, Respondent did support its claim that the reasons given for terminating Petitioner's employment were not a pretext.

Respondent was motivated only by a belief that Petitioner had violated the law, specifically Subsection 893.13(6)(a), Florida Statutes, (2009), that provides:

(6)(a) It is unlawful for any person to be in actual or constructive possession of a controlled substance unless such controlled substance was lawfully obtained from a practitioner or pursuant to a valid prescription or order of a practitioner while acting in the course of his or her professional practice or to be in actual or constructive possession of a controlled substance except as otherwise authorized by this chapter. Any person who violates this provision commits a felony of the third degree, punishable as provided in s. 775.082, s. 775.083, or s. 775.084.

27. Petitioner was discharged from his employment because Respondent believed that Petitioner had committed a felony by purchasing and using Schedule III drugs without valid prescriptions.

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 adopting the Findings of Fact and Conclusions of Law contained in this Recommended Order. It is further RECOMMENDED that the final order dismiss the Petition for Relief.

DONE AND ENTERED this 8th day of December, 2009, in Tallahassee, Leon County, Florida.



ELEANOR M. HUNTER
Administrative Law Judge
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Filed with the Clerk of the
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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.