

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JACQUELINE TORY, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 10-4817  
 )  
 CASTLE, THE PARENTING )  
 PROFESSIONALS, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Administrative Law Judge Eleanor M. Hunter held a final hearing in this case by video teleconference at sites in Port St. Lucie and Tallahassee, Florida, on August 19, 2010.

APPEARANCES

For Petitioner: Jacqueline Tory, pro se  
2425 12th Avenue Southwest  
Vero Beach, Florida 32962

For Respondent: William H. Andrews, Esquire  
Gray Robinson  
50 North Laura Street, Suite 1100  
Jacksonville, Florida 32202

STATEMENT OF THE ISSUE

The issue is whether Respondent committed an unlawful employment practice by discriminating against Petitioner on the basis of a disability in violation of the Florida Civil Rights Act of 1992, as amended, Chapter 760, Florida Statutes (2010).

## PRELIMINARY STATEMENT

On December 14, 2009, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations (the Commission). Following an investigation, the Commission issued a "Determination: No Cause" on May 27, 2010, meaning it found no reasonable cause to believe that an unlawful employment practice occurred. Petitioner filed a Petition for Relief, and the Commission referred the matter to the Division of Administrative Hearings on July 14, 2010. A Notice of Hearing was issued, and the hearing was held as scheduled on August 19, 2010.

At the hearing, Petitioner appeared and testified on her own behalf. Respondent presented the testimony of Teresa Cleveland and Ruth Orenstein. Respondent's Exhibits 1-14 were received in evidence. No transcript of the hearing has been filed. Petitioner filed her Proposed Findings on August 28, 2010. Respondent filed Proposed Findings of Fact and Conclusions of Law on September 7, 2010.

## FINDINGS OF FACT

1. Petitioner, Jacqueline Tory ("Petitioner" or "Ms. Tory"), filed a Charge of Discrimination, dated December 14, 2009, alleging that she was the victim of an unlawful employment practice. More specifically, Ms. Tory charged that she was terminated from employment due to a

disability and that her former employer illegally obtained copies of her medical records.

2. Respondent, Castle, The Parenting Professionals ("Respondent"), is an "employer" within the meaning of the Florida Civil Rights Act of 1992. Respondent provides parenting counseling and child abuse prevention services.

3. Petitioner applied for a job as a case manager with Respondent. She was interviewed by Respondent's Human Resources ("HR") Specialist Teresa Cleveland and by her prospective supervisor, Program Manager Ruth Orenstein.

4. Petitioner claimed that during her interview she told Ms. Cleveland and Ms. Orenstein that she had a disability. Neither of them recalled having been given that information and, if they were, a claim of discrimination on that basis is inconsistent with the fact that they hired her immediately. On September 1, 2009, she signed and dated an employment application. She also signed and dated a position description acknowledging her job responsibilities, including a section entitled "essential physical skills."

5. The position description included a space that was left blank following the words: "I will require the following accommodations to do this job in order to meet the requirements of this position."

6. After giving notice to her previous employer, Petitioner began working for Respondent on October 12, 2009. The record indicates that she signed for and received a handbook, outlining work hour expectations, from Respondent's HR Department on October 13, 2009.

7. After Petitioner was tardy every day during her first week at work, Ms. Orenstein spoke to Petitioner about her tardiness, on October 16, 2009. Petitioner became argumentative. Petitioner claimed that the HR Department had prior notice of a physical impairment that made it impossible for her to get to work at 8:00 a.m.

8. Ms. Orenstein consulted Ms. Cleveland from HR, who had no medical records or request for accommodations from Petitioner. Ms. Orenstein then received the approval of an Assistant Director to terminate Petitioner's employment that day because of her tardiness and because of the way she treated her.

9. Contrary to the assertion that a disability caused her to be tardy, Petitioner, at hearing, testified that she was terminated after telling her employer that she had to have monthly medical appointments for injections to alleviate chronic neck pain. She also testified that she suffers from depression. She speculated, without any evidence, that Respondent, a small 15-person organization, was concerned about rising health care cost after learning of her condition.

10. The evidence in the record related to Petitioner's medical condition was created after the date she was terminated. It includes a physician's note on a sheet from a prescription pad dated March 24, 2010, that states: "Petitioner is unable to work due to her chronic pain, anxiety, and asthma." A Psychological Evaluation, dated January 29, 2010, has the following reason given for the referral:

The Department of Health, Office of Disability Determination referred Ms. Tory for a psychological evaluation. This evaluation will be used as an aid in determining eligibility for disability benefits.

11. Petitioner presented insufficient evidence to establish that Respondent knew that she had a disability, if any, on October 16, 2009. Therefore, Petitioner failed to establish that she suffered from an unlawful employment practice.

#### CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat (2010).

13. Section 760.10, Florida Statutes (2010), provides that:

- (1) It is an unlawful employment practice for an employer:
  - (a) 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 race, color, religion, sex, national origin, age, handicap, or marital status.

14. To establish a prima facie case of discrimination, Petitioner must prove by a preponderance of the evidence: (1) that she is a handicapped person within the meaning of Subsection 760.10(1)(a); (2) that she is a qualified individual; and (3) that Respondent discriminated against her on the basis of her disability. See Earl v. Mervyns, 207 F.3d 1361, 1365 (11th Cir. 2000); Pritchard v. S. Co. Servs., 92 F.3d 1130 (11th Cir.1996); and Byrd v. BT Foods, Inc., 948 So. 2d 921 (Fla. 4th DCA 2007).

15. The term "handicap" in the Florida Civil Rights Act is treated as equivalent to the term "disability" in the Americans With Disabilities Act." See Ross v. Jim Adams Ford, Inc., 871 So. 2d 312 (Fla. 2d DCA 2004).

16. The ADA defines a "disability" as "a physical or mental impairment that substantially limits one or more of the major life activities of such individual, a record of such impairment; or being regarded as having such an impairment." 42 U.S.C. § 12102(2). "Major life activities" include "functions such as caring for oneself, performing manual tasks, walking, seeing, hearing, speaking, breathing, learning and working."

Bragdon v. Abbott, 524 U.S. 624, 118 S. Ct. 2196, 141 L. Ed. 2d 540 (1998); see 45 C.F.R. § 84.3(j)(2)(ii); and 28 C.F.R. § 41.31(b)(2)(1997).

17. In Sutton v. United Air Lines, Inc., the Supreme Court declared that whether a person is disabled under the ADA is an "individualized inquiry." It stated:

The definition of disability . . . requires that disabilities be evaluated 'with respect to an individual' and be determined based on whether an impairment substantially limits the major life activities of such individual.' Thus, whether a person has a disability under the ADA is an individualized inquiry.

Id. at 484.

18. Petitioner failed to prove that she had a disability in October 2009, or that Respondent perceived her as having had a disability at the time her employment was terminated. Petitioner failed to prove that Respondent had access to her medical records at the time of her discharge from employment. Petitioner, therefore, has not established a prima facie case of discrimination. See St. Johns County School District v. O'Brien, 973 So. 2d 535 (Fla. 5th DCA 2007).

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law it is RECOMMENDED that the Commission enter a final order finding Respondent not guilty of the allegations, and dismissing Petitioner's Charge of Discrimination and Petition for Relief.

DONE AND ENTERED this 16th day of September, 2010, in  
Tallahassee, Leon County, Florida.



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ELEANOR M. HUNTER  
Administrative Law Judge  
Division of Administrative Hearings  
The DeSoto Building  
1230 Apalachee Parkway  
Tallahassee, Florida 32399-3060  
(850) 488-9675  
Fax Filing (850) 921-6847  
www.doah.state.fl.us

Filed with the Clerk of the  
Division of Administrative Hearings  
this 16th day of September, 2010.

COPIES FURNISHED:

Denise Crawford, Agency Clerk  
Florida Commission on Human Relations  
2009 Apalachee Parkway, Suite 100  
Tallahassee, Florida 32301

Larry Kranert, General Counsel  
Florida Commission on Human Relations  
2009 Apalachee Parkway, Suite 100  
Tallahassee, Florida 32301

Jacqueline Tory  
2425 12th Avenue Southwest  
Vero Beach, Florida 32962

William H. Andrews, Esquire  
Gray Robinson  
50 North Laura Street, Suite 1100  
Jacksonville, Florida 32202



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.