

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

SIMON ROWLAND,)
)
 Petitioner,)
)
 vs.) Case No. 11-0562
)
 WINN DIXIE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Pursuant to notice to all parties, a final hearing was conducted in this case on April 7, 2011, in Winter Haven, Florida, before Administrative Law Judge R. Bruce McKibben of the Division of Administrative Hearings. The parties were represented as set forth below.

APPEARANCES

For Petitioner: Simon Rowland, pro se
5936 Silver Fox Drive
Winter Haven, Florida 33884

For Respondent: Cherie L. Silberman, Esquire
Constangy, Brooks & Smith, LLP
100 North Tampa Street, Suite 3350
Tampa, Florida 33601-1840

STATEMENT OF THE ISSUE

The issue in this case is whether Respondent, Winn Dixie, discriminated against Petitioner, Simon Rowland, on the basis of

his disability (cerebral palsy) in violation of the Florida Civil Rights Act.

PRELIMINARY STATEMENT

On or about June 28, 2010, Petitioner filed an Employment Complaint of Discrimination with the Florida Commission on Human Relations ("Commission"). The Commission entered a Determination: No Cause dated January 6, 2011. Petitioner timely filed a Petition for Relief which was forwarded to the Division of Administrative Hearings on February 11, 2011. The undersigned Administrative Law Judge was assigned to the case, and a final hearing was set on the date and place indicated above.

At the final hearing, Petitioner testified on his own behalf and offered no exhibits into evidence. Respondent called one witness, Lora Prine, and offered no exhibits into evidence.

A transcript of the final hearing was not ordered by the parties. By rule, parties were allowed ten days to submit proposed recommended orders. Respondent timely submitted a Proposed Recommended Order, and it was duly considered in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Petitioner is an elderly man who has had cerebral palsy since birth.

2. In August 2004, Petitioner went to work at the Dundee, Florida, Winn Dixie store as a courtesy clerk or bagger. His duties were to retrieve shopping carts from the parking lot, help customers, clean restrooms, and other general duties. He was not as fast a worker as others, but Winn Dixie accommodated him so that he could continue working.

3. Petitioner claims that he was initially told he would work 20 to 25 hours per week. Winn Dixie asserts that he was given no indication of hours he might work. It is clear that Petitioner worked approximately ten hours per week during his employment. Lora Prine was the manager of the Dundee store, and Petitioner enjoyed working with Prine.

4. Prine was later transferred to the Winter Haven store, and Petitioner asked to be transferred there, as well. There was no position open at first, but when a position became available, Prine contacted Petitioner to apply. When he was hired at the Winter Haven store, Petitioner was told that he would average between ten and 15 hours per week.

5. While Petitioner was working at the Winter Haven store, Prine would make sure that his duties were consistent with his capabilities. She would make sure that Petitioner had assistance when lifting heavy objects, for example, when he was bagging groceries. Prine also allowed Petitioner to leave work early on many occasions due to illness and to miss work

altogether at times, e.g., when he needed to visit his ailing brother in Gainesville. Petitioner freely admits that Prine and Winn Dixie accommodated him when he was working there.

6. In November 2009, Petitioner was hospitalized for a week. The hospitalization involved an unnamed malady, but Petitioner was adamant that it did not involve a stroke. There is no evidence that Winn Dixie believes Petitioner suffered a stroke at that time. Upon release from the hospital, Petitioner was provided with portable oxygen. He said that the oxygen was supposed to be used while he was sleeping, but he used it a few times during the day right after he got out of the hospital. Prine learned from Petitioner's son that Petitioner was using oxygen.

7. In mid-January 2010, Petitioner called Prine to see about coming back to work. Prine had just returned from medical leave and asked Petitioner to call her back in a few days. When Petitioner called back, he discussed his hospitalization and convalescence with Prine. He informed Prine of his need to utilize oxygen as a result of his illness. Prine suggested to Petitioner that maybe it was time for him to retire; Petitioner agreed with Prine that it was time.

8. Prine annotated Petitioner's work file to indicate he was on retired status.

CONCLUSIONS OF LAW

9. The Division of Administrative Hearings has jurisdiction over the parties to and the subject matter of this proceeding pursuant to sections 120.569 and 120.57(1), Florida Statutes (2010).^{1/}

10. The Florida Civil Rights Act of 1992 (the "Act") is codified in sections 760.01 through 760.11 and section 509.092, Florida Statutes. Among other things, the Act makes certain actions by employers "unlawful employment practices" and gives the Commission authority, following an administrative hearing conducted pursuant to sections 120.569 and 120.57, to issue an order "prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay." §§ 760.10 and 760.11(6).

11. Petitioner has the burden of proof that he was the victim of a discriminatory act. See Dep't of Banking and Fin. v. Osborne Stern and Co., 670 So. 2d 932, 934 (Fla. 1996), wherein the Court stated: "The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."

12. In order to support a claim of discrimination under the Florida Civil Rights Act, Petitioner must first establish that he is a member of a protected class. His uncontroverted testimony is that he suffers from cerebral palsy.

13. In a discrimination case, the petitioner has the initial burden of establishing a prima facie case of discrimination. McDonnell Douglas Corp. v. Green, 411 U.S. 792, 93 S. Ct. 1817, 36 L. Ed. 2d 668 (1973). Once the petitioner proves a prima facie case of discrimination, the burden shifts to the respondent to proffer a legitimate, non-discriminatory reason for the action it took. Texas Dep't of Cmty. Aff. v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981). The respondent's burden is one of production, not persuasion.

14. In the present case, however, Petitioner met his initial burden of proof as to his status as a member of a protected class. However, Petitioner then freely admitted that Winn Dixie had not discriminated against him and had provided him all necessary accommodations to perform his work tasks. However, he had communicated his decision to retire to his employer, who acted on that communication by having other employees cover the hours Petitioner would have worked.

15. Petitioner is frustrated because he now wants to go back to work. However, he did not prove that he was discriminated against for any reason.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED that a final order be entered by the Florida Commission on Human Relations denying Petitioner, Simon Rowland's, Petition for Relief in full.

DONE AND ENTERED this 19th day of April, 2011, in Tallahassee, Leon County, Florida.



R. BRUCE MCKIBBEN
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 19th day of April, 2011.

ENDNOTE

^{1/} Unless specifically stated otherwise herein, all references to Florida Statutes shall be to the 2010 version.

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.