

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

CHRISTINE LEINONEN,

Petitioner,

vs.

Case No. 13-0826

OFFICE OF CRIMINAL CONFLICT
AND CIVIL REGIONAL COUNSEL,

Respondent.

_____ /

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (Division) heard this case by video teleconference on May 17, 2013, at sites in Lakeland and Tallahassee, Florida.

APPEARANCES

For Petitioner: Christine Leinonen, pro se
9045 Woodview
Polk City, Florida 33868

For Respondent: Audrey H. Moore, Esquire
Elmer C. Ignacio, Esquire
Office of the Attorney General
The Capitol, Plaza Level 01
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STATEMENT OF THE ISSUE

Did Respondent, Office of Criminal Conflict and Civil Regional Counsel (Regional Counsel), discharge Petitioner,

Christine Leinonen, because of a handicap in violation of section 760.10(1)(a), Florida Statutes (2012)?^{1/}

PRELIMINARY STATEMENT

Ms. Leinonen filed a Charge of Discrimination with the Florida Commission on Human Relations (Commission) alleging that the Regional Counsel unlawfully discharged her because of a bruised heel amounting to a handicap. The Commission determined that there was no reasonable cause to believe that Regional Counsel committed an unlawful employment practice and dismissed Ms. Leinonen's claim. She filed a Petition for Relief from an Unlawful Employment Practice. On March 11, 2013, the Commission referred the petition to the Division to conduct a formal hearing.

On March 22, 2013, the Division set the hearing to begin on May 17, 2013. The hearing convened as scheduled. Ms. Leinonen testified on her own behalf. Her Exhibits 1 through 4 were admitted into evidence. She also entered Regional Counsel's Exhibits H-4 and H-5 into evidence. Regional Counsel presented testimony from Diana Golden, Amilee Kalapp, Kim Kikta, and Ms. Leinonen. Regional Counsel's Exhibits A through E, H-1, and H-2 were admitted.

At the end of the hearing, the undersigned granted the parties' motion to enlarge the time for filing proposed recommended orders. The parties ordered a Transcript which was

filed June 6, 2013. The parties timely filed proposed recommended orders. They have been considered in the preparation of this Recommended Order.

FINDINGS OF FACT

Based on the evidence presented at the final hearing and on the entire record of this proceeding, the following Findings of Fact are made:

1. Regional Counsel is a state agency that provides legal representation to individuals whom a public defender's office cannot represent because of conflicts. The office represents indigent criminal defendants, parents and guardians in child dependency proceedings and parties in Marchman (involuntary treatment for substance abuse) and Baker Act (involuntary commitment for mental illness) cases.

2. Ms. Leinonen is a former police officer who has been a member of the Florida Bar since 1999. In August of 2012, she had been working as an attorney with Regional Counsel for approximately two and one-half years. Ms. Leinonen represented parties in dependency proceedings for Regional Counsel. Her employment with Regional Counsel, until her discharge, was satisfactory. She also had never been the subject of complaints by clients, opposing counsel, witnesses, judges, or other court personnel.

3. Regional Counsel discharged Ms. Leinonen on August 16, 2012.

4. Ms. Leinonen's supervisor at the time and all times relevant to this matter, Elisabeth Lewis, made the termination decision. Ms. Lewis is now deceased due to cancer.

5. The interactions that ended with Ms. Leinonen's termination began in April 2012.

6. Ms. Leinonen is a long-distance runner. Sometime in April 2012, Ms. Leinonen noticed a pain that she attributed to a bruised heel.

7. Ms. Leinonen completed the Boston Marathon on April 16, 2012. The bruised heel did not cause her pain or problems during the race or in her training.

8. Ms. Lewis and other co-workers knew that Ms. Leinonen was a runner and had completed the Boston Marathon.

9. Ms. Leinonen described the pain from her bruised heel as comparable to a toe blister. It was not disabling. But some shoes aggravated the pain. Ms. Leinonen identified five pairs of shoes that she could wear comfortably without pain. Three pairs were sandals. Two pairs were sandal-like with partially enclosed toes. Two pairs of the sandals had heels of approximately one inch. One pair had a one and one-half inch heel. The other two pairs of shoes had heels of about one-half an inch.

10. Ms. Leinonen saw her physician, Marta Escobar Klapprot, on May 25, 2012. She reported completing the Boston Marathon and feeling well. She denied having any acute complaints, including any complaint about her bruised heel.

11. On May 25, 2012, Ms. Leinonen saw Dr. Eberto Pineiro to follow up on restless leg syndrome problems. At that visit, she also reported completing the Boston Marathon and doing well. Ms. Leinonen reported some weakness in her legs, but did not report any problems attributed to a bruised heel.

12. Ms. Leinonen twice signed documents acknowledging receipt of the Regional Counsel's dress code guidelines, once on January 12, 2010, and once on June 5, 2012. The phrase "dress code guidelines" refers to the Appearance section of the Regional Counsel's Employee Handbook.

13. The dress code guidelines state that "[e]mployees are expected to be neat and clean in appearance and dress in appropriate business attire" The policy explicitly permits "dress or casual shoes including sandals" for women. It prohibits "sweat pants, shorts (including business shorts) or leggings" for men and women.

14. From mid-June through August 2012, of the five pairs of shoes she had been wearing, Ms. Leinonen could only wear the pair she refers to as the Avon toner sandals without pain from her

bruised heel. Although she refers to the toner sandals as "Avon," they are marked "Curves."

15. The "toner sandal" sole is made of a soft, spongy material with a contoured foot bed and a heel height of approximately one inch. The sandal has two straps. One broad gray strap, trimmed in violet, rises from the rear of the shoe and crosses over the front of the ankle. The other strap, gray and unadorned, begins in the same place as the ankle strap and flows toward the front of the shoe to join the sole in a traditional sandal's thin strap that fits between the great toe and the adjacent toe. The sole of the sandal is light gray on top and dark gray on bottom with a strip of violet, matching the trim of the broad ankle strap, separating the soles at the rear half of the sandal.

16. Sometime in early August, Ms. Leinonen walked by Ms. Lewis who was outside taking a cigarette break with Kim Kikta. Ms. Kikta was the supervisor of the administrative support staff. She had no supervisory authority over Ms. Leinonen. That day Ms. Leinonen was wearing the toner sandals.

17. Ms. Lewis said, "Christine, what's with the shoes?" Ms. Leinonen replied that they were therapeutic. Ms. Lewis said, "Get them off." Ms. Leinonen proceeded to her car.

18. For the next week or so, Ms. Leinonen did not wear the toner sandals, wearing wedge-heeled shoes instead. She iced her heel periodically during the day when in her office.

19. On Monday, August 13, 2012, Ms. Leinonen worked a nine and one-half hour day, on her feet the entire day, wearing a heeled shoe. At the end of the day, she experienced shooting pains going up her foot.

20. The next day was a seven-hour day on her feet. Ms. Leinonen wore the toner sandals.

21. The following day, Wednesday, August 15, 2012, Ms. Leinonen wore the toner sandals again because she was in pain, and her ability to walk was impaired.

22. She also wore a vintage, plaid garment that she had owned and worn in professional contexts for over 20 years. The garment is a loose-fitting knee length item with buttons on one side. The garment is not a full skirt. It is a divided skirt similar to shorts with a broad flap in the front that makes it indistinguishable from a skirt from the front. From the rear, an observer can see that the garment is divided, like shorts. Depending upon the fashion era, garments like this one have been known as "skorts" or "culottes."

23. Ms. Leinonen had worn the garment to work at the Regional Counsel's office many times, to court, and to mediations without comment or criticism.

24. Ms. Leinonen's supervisor, Ms. Lewis, was not in the office on August 15, 2012.

25. On that day, Ms. Kikta observed Ms. Leinonen wearing the plaid garment. Ms. Kikta walked into Ms. Leinonen's office and, in her words, "confronted" Ms. Leinonen and told her that the plaid garment was a pair of shorts and that she was not allowed to wear it at the office.

26. Credible convincing evidence does not establish that Ms. Kikta had any supervisory authority over Ms. Leinonen or other attorneys.

27. Ms. Leinonen disagreed with Ms. Kikta's conclusion that the garment was a pair of shorts. They argued briefly. Ms. Leinonen, who was in pain and being corrected by an individual who was not her supervisor, was irritated and displayed the irritation in the tone and volume of her voice.

28. Ms. Kikta did not refer to Ms. Leinonen's toner sandals in this encounter.

29. Ms. Kikta was upset. She told attorney Amilee Kalapp about her confrontation of Ms. Leinonen. Ms. Kalapp was a misdemeanor attorney who had been working with the Regional Counsel for approximately five weeks.

30. Weeks before, Ms. Lewis had generally advised Ms. Kalapp that Ms. Kalapp would be in charge of the office when Ms. Lewis was absent.

31. Ms. Leinonen was not advised of this, however. The evidence indicates only that Ms. Kalapp and Ms. Kikta were aware of Ms. Lewis's delegation of authority to Ms. Kalapp. There is no evidence that Ms. Lewis advised employees of the delegation or that Ms. Leinonen was aware of it.

32. Ms. Kalapp texted Ms. Lewis about the situation and asked if she could tell Ms. Leinonen she had to change clothes before she could go to court. Ms. Lewis texted back that Ms. Kalapp could.

33. Ms. Kalapp then confronted Ms. Leinonen and told her that her garment was not appropriate for court or mediations and that she had to change before going to either.

34. Ms. Leinonen disagreed and reported that she had conducted some research indicating the garment was a pair of "culottes," not a "skort" or shorts. Ms. Kalapp said that did not matter and that Ms. Leinonen had to change.

35. Ms. Leinonen, who was in pain, was upset and raised her voice slightly. Ms. Kalapp left Ms. Leinonen's office.

36. A little later, Ms. Leinonen came to the doorway of Ms. Kalapp's office and repeated her view of the nature of the challenged garment. She did not yell or create a disturbance.

37. Ms. Leinonen told Ms. Kalapp that she would leave. She also told her that she knew Ms. Kalapp would call Ms. Lewis and

that the toner sandals she was wearing were therapeutic.

Ms. Kalapp said she was not talking about the shoes that day.

38. Ms. Leinonen said she would not damage her foot for the job and that she would not return to work until she obtained authority from a doctor to wear therapeutic shoes.

39. Ms. Kalapp told Ms. Leinonen that she should do whatever she thought was best for her health. Ms. Leinonen then left.

40. The following day, August 16, 2012, Ms. Leinonen sent Ms. Lewis a text advising that she would not be in because of medical reasons. Staff and attorneys routinely communicated with Ms. Lewis by text message, including about taking leave. This was a common and accepted practice in the office.

41. Ms. Leinonen's August 16, 2012, text message stated:

Good morning! I told Amy [Kalapp] yesterday that's [sic] I was going to be out sick until I could be seen by a doctor who could give me medical clearance to be able to walk wearing therapeutic shoes. I followed your directive to stop wearing my shoes which turned [sic] out to be to my detriment. As such I am on medical leave of absence. I have an appointment with my doctors [sic] office who has to then refer me to a specialist.

42. Ms. Lewis replied: "You are not on approved leave[;] your attendance at a 10:30 meeting is mandatory."

43. Ms. Leinonen responded:

I am sick and cannot make it to your meeting. I have sick time, annual time, and comp time available to me and I am entitled to use them. I have shooting pains going up my leg and I'm unable to walk without therapeutic shoes. I don't want to cause further damage to my foot. So until I can get proper medical clearance I will not be in to work. Thank you.

44. Credible and convincing evidence does not establish any further communications or efforts to communicate between Ms. Lewis and Ms. Leinonen until Ms. Lewis sent the following letter on August 16, 2012, by email and U.S. mail. The letter states:

Effective immediately, you are being dismissed (August 16, 2012) from your position as Assistant Regional Counsel with the Office of Criminal Conflict and Civil Regional Counsel for the Second District.

This action is being taken due to insubordination and conduct unbecoming a public employee.

Please return any State equipment you may have in your possession to the office and also make arrangements to retrieve any personal items that may be in the building during normal business hours, Monday through Friday, 8:00 a.m. to 5:00 p.m.

CONCLUSIONS OF LAW

45. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding and of

the parties pursuant to sections 120.569 and 120.57(1), Florida Statutes.

46. Section 760.11(7) permits a party who receives a no cause determination to request a formal administrative hearing before the Division. "If the administrative law judge finds that a violation of the Florida Civil Rights Act of 1992 has occurred, he or she shall issue an appropriate recommended order to the Commission prohibiting the practice and recommending affirmative relief from the effects of the practice, including back-pay." Id.

47. Ms. Leinonen claims that Regional Counsel terminated her because of a handicap or a perception of a handicap, specifically her bruised heel. Section 760.10(1)(a) prohibits discharging an employee on account of a handicap. Ms. Leinonen must prove her claim by a preponderance of the evidence. Dep't. of Banking & Fin. Inv. Prot. v. Osborne Stern & Co., Inc., 670 So. 2d 932 (Fla. 1996).

48. Employers may not take adverse action against an employee for an unlawful reason, such as age or a handicap. However, the law does not prohibit erroneous, irrational, or unfair employment actions. Sunbeam Television Corp. v. Marilyn A. Mitzel, 83 So. 3d 865 (Fla. 3d DCA 2012). Courts do not serve as super personnel offices. No matter how mistaken, unreasonable, high-handed, or medieval an employment decision is,

it does not violate the law if the employer does not act for a forbidden reason. Chapman v. AI Transp., 229 F.3d 1012, 1030 (11th Cir. 2000).

49. An employee may prove a discrimination claim by direct evidence. Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1086 (11th Cir. 2004). Direct evidence of discrimination is evidence that, if believed, proves the existence of a fact without inference or presumption. Carter v. City of Miami, 870 F.2d 578, 581-82 (11th Cir. 1989).

50. Ms. Leinonen maintains Regional Counsel discriminated against her because of her bruised heel and that the bruised heel was a handicap. A person has a handicap if the "person has a physical or mental impairment which substantially limits one or more major life activities" § 760.22(7)(a), Fla. Stat. The persuasive, competent evidence does not establish that Ms. Leinonen's bruised heel was a handicap.

51. The persuasive, competent evidence also does not establish that Ms. Leinonen's bruised heel or her desire to wear the "toner" sandals were the reasons for her discharge. Regional Counsel discharged Ms. Leinonen because of the kerfuffle arising from the garment that she wore on August 15, 2012.

52. Consequently, there is no persuasive, competent direct evidence proving that Regional Counsel discharged Ms. Leinonen

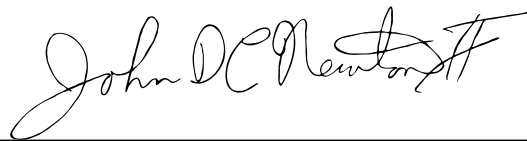
because of a handicap, her bruised heel, or a perception that she had a handicap.

53. An employee may also prove a claim of discrimination by circumstantial evidence establishing that similarly-situated employees, who were not in her protected class, were treated more favorably than she was. Wilson v. B/E Aerospace, Inc., supra, at 1087. Here, there is no persuasive, competent circumstantial evidence proving that Regional Counsel discharged Ms. Leinonen because of a handicap or a perception that she had a handicap.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human Relations deny the Petition for Relief of Christine Leinonen.

DONE AND ENTERED this 25th day of July, 2013, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of July, 2013.

ENDNOTE

^{1/} All references to the Florida Statutes are to the 2012 edition unless otherwise noted.

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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.