

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

DAVID E. MCDONALD,

Petitioner,

vs.

Case No. 15-0216

FRESENIUS MEDICAL CARE,

Respondent.

_____ /

RECOMMENDED ORDER

Administrative Law Judge John D. C. Newton, II, of the Division of Administrative Hearings (Division) heard this case by telephone conference call on April 16, 2015, in Tallahassee, Florida.

APPEARANCES

For Petitioner: David E. McDonald, pro se
2115 Sunrise Drive
Sebring, Florida 33872

For Respondent: Richard N. Margulies, Esquire
Jackson Lewis, P.C.
Suite 902
501 Riverside Avenue
Jacksonville, Florida 32202

STATEMENT OF THE ISSUES

A. Did Respondent, Fresenius Medical Care (Fresenius), discriminate against Petitioner, David E. McDonald, in employment on account of his disability?

B. Did Fresenius discriminate against Mr. McDonald in employment on account of his age?

PRELIMINARY STATEMENT

Mr. McDonald filed a complaint of age and disability discrimination with the Florida Commission on Human Relations (FCHR) on August 18, 2014. In his complaint, Mr. McDonald alleged that the long-term disability benefits insurance provided by his employer discriminated against him on the basis of his age and disability by only providing long-term disability benefits for one year, based on his age at the time long-term disability benefits commenced.

The Florida Commission on Human Relations issued a Determination of No Cause on December 31, 2014.

Mr. McDonald filed a timely Petition for Relief with FCHR on January 13, 2015. The Petition asserts that Mr. McDonald experienced a "mini-stroke" and suffered vision problems in his right eye from it. This is his allegation of a disability.

The Commission referred the matter to the Division of Administrative Hearings to conduct a hearing on the Petition. The undersigned conducted the hearing, after one continuance, on April 16, 2015.

Mr. McDonald subpoenaed Ryan Zech of the insurance company CIGNA. The subpoena was served in the evening of April 14, 2015. Mr. Zech moved to quash the subpoena on account of short notice

and his unavailability on April 16, 2015. At the start of the hearing, the undersigned granted the motion subject to re-visiting it after the parties presented evidence to allow a better opportunity to evaluate the need for Mr. Zech's testimony and consider continuing the hearing to obtain his testimony.

Mr. McDonald had tried to subpoena Mr. Zech earlier in this proceeding using an address provided by counsel for Fresenius. That address turned out to be incorrect. Counsel provided a second address, which is the one where Mr. Zech was served. The evidence presented by Mr. McDonald and his argument made it clear that Mr. Zech did not have testimony relevant to the issues in this proceeding. His testimony related to Mr. McDonald's continuing claim that Mr. Zech did not properly inform him about the limits of disability insurance when he elected to claim the benefits. That claim cannot be addressed in this proceeding to determine whether Fresenius discriminated against Mr. McDonald. The subpoena is quashed.

Mr. McDonald testified and agreed to admission of Fresenius Exhibits 3 and 6 during his testimony. After Mr. McDonald testified, he repeatedly confirmed that he had no other evidence to present except the testimony of Mr. Zech. Kathy Hardwick, clinical manager for Fresenius, was available to testify, if called. Mr. McDonald did not express a desire to have her testify.

Fresenius moved for a directed verdict. The undersigned advised that the rules governing this proceeding do not provide for a directed verdict. The undersigned also advised that the testimony of Mr. McDonald made it clear that he did not claim that Fresenius had discriminated against him and that he had no evidence of discrimination. The undersigned terminated the hearing for resolution on the basis of the undisputed facts presented during Mr. McDonald's case-in-chief. Both parties were given an opportunity to submit proposed recommended orders.

The parties did not order a transcript. Fresenius timely filed a proposed recommended order. Mr. McDonald filed a letter to the undersigned denominated "Settlement Phase," stating that it was time to submit "Settlement Proposals to your good self." The letter offered to waive costs, objected to the unavailability of Ryan Zech as a witness, and objected to the purported unavailability of Kathy Hardwick as a witness. The letter also requested that FCHR award Mr. McDonald "**Long Term disability** payments; according to the; usual and time honored **definition of Long Term.**" The letter also asked: "Failing LTD payments, I request a **substantial lump sum payment** in lieu thereof."

FINDINGS OF FACT

1. Mr. McDonald worked for Fresenius as a social worker in its Sebring, Florida, facility.

2. Fresenius provided Mr. McDonald family and medical leave because of back and knee problems. After Mr. McDonald exhausted the available leave, Fresenius granted him non-FMLA medical leave.

3. Because of his continuing health problems, Mr. McDonald obtained long-term disability benefits in 2013 under a plan provided by CIGNA and sponsored by Fresenius. Mr. McDonald was 79 years old. Mr. McDonald's testimony established that he received one year of benefit payments under the plan.

4. On August 29, 2013, Mr. McDonald wrote Fresenius a letter identified as regarding "L.T.D. approval." The first three paragraphs stated:

On Saturday 7/27/13, I received a copy of the letter dated 7/19/13 sent to you by Ryan Zech, of CIGNA, informing you that my "claim for Long Term Disability was approved, benefits starting on 8/07/13."

This means, barring the time it takes for me to reconcile my affairs with our H.R Dept. that my employment with F.M.C. has come to an end.

I had hoped that my medical condition would have improved, such that I would have been able to perform effectively, the required percentage of my duties to qualify to return to F/T employment. This has not turned out to be the case. It is therefore with mixed sentiments that I accept the medical decision/s of CIGNA and my attending physicians including my "Eye specialists."

5. This letter stated Mr. McDonald's voluntary decision to end his employment with Fresenius. Mr. McDonald did not present evidence that the decision was coerced or even encouraged by any representative of Fresenius. Mr. McDonald voluntarily terminated his employment with Fresenius.

6. Mr. McDonald does not maintain that Fresenius discriminated against him on account of age or disability. He testified repeatedly and clearly that he does not claim that Fresenius discriminated against him in any way on account of his age or physical condition.

7. Mr. McDonald bases his complaint upon his assertion that CIGNA representative Mr. Zech did not properly advise him that the long-term disability policy provided only one year of payments.

8. Mr. McDonald also did not present any evidence that could support an inference that Fresenius discriminated against him on account of his age or a disability.

9. Mr. McDonald did not argue or present evidence that CIGNA employee Ryan Zech was an employee or agent of Fresenius.

CONCLUSIONS OF LAW

10. 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 (2014).^{1/}

11. Section 760.11(7), Florida Statutes, 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.

12. Section 760.10(1)(a) makes it unlawful for an employer to take an adverse action against an individual because of the individual's age or because of the individual's disability.

13. Mr. McDonald bears the burden of proving the allegations of his Petition by a preponderance of the evidence. See Dep't of Banking & Fin., Div. of Sec. & Investor Prot. v. Osborne Stern & Co., 670 So. 2d 932, 934 (Fla. 1996) ("The general rule is that a party asserting the affirmative of an issue has the burden of presenting evidence as to that issue."); Fla. Dep't of Transp. v. J.W.C. Co., Inc., 396 So. 2d 778, 788 (Fla. 1st DCA 1981); and Vero Beach Land Co., LLC v. IMG Citrus, Inc., Case No. 08-5435 (Fla. DOAH Mar. 4, 2009; Fla. DACS July 20, 2009), aff'd, IMG Citrus, Inc. v. Vero Beach Land Co., LLC, 46 So. 3d 1014 (Fla. 4th DCA 2010).

14. There is no persuasive, credible evidence that Fresenius discriminated against Mr. McDonald on account of age or

disability. In addition, Mr. McDonald does not claim that Fresenius discriminated against him.

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 David E. McDonald.

DONE AND ENTERED this 13th day of May, 2015, in Tallahassee, Leon County, Florida.



JOHN D. C. NEWTON, II
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 13th day of May, 2015.

ENDNOTE

^{1/} All statutory references are to Florida Statutes (2014), unless otherwise noted.

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.