

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

XIANSHU ZHANG,

Petitioner,

vs.

Case No. 16-2820

DEPARTMENT OF HEALTH,

Respondent.

_____ /

RECOMMENDED ORDER

Pursuant to notice, a final hearing was conducted in this case on February 16, 2017, via video teleconference at sites in Orlando and Tallahassee, Florida, before Garnett W. Chisenhall, a duly-designated Administrative Law Judge ("ALJ") of the Division of Administrative Hearings ("DOAH").

APPEARANCES

For Petitioner: Jamison Jessup, Qualified Representative
2955 Enterprise Road, Suite B
DeBary, Florida 32713

For Respondent: Michael Jovane Williams, Esquire
Florida Department of Health
Office of the General Counsel
4052 Bald Cypress Way, Bin C-65
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STATEMENT OF THE ISSUE

The issue is whether Respondent ("the Department of Health" or "the Department") committed an unlawful employment practice by not providing Petitioner ("Xianshu Zhang") with a licensure

application in Mandarin Chinese or by continuing with its prosecution of her.

PRELIMINARY STATEMENT

Ms. Zhang filed a complaint of discrimination with the Florida Commission on Human Relations ("the Commission") alleging that the Department of Health violated the Florida Civil Rights Act of 1992.

After conducting an investigation, the Commission issued a letter on April 20, 2016, notifying Ms. Zhang that it had determined that there was no reasonable cause to conclude that an unlawful employment practice had occurred:

[Ms. Zhang] filed a charge of discrimination against [the Department] alleging that she was subjected to different terms and conditions and disciplined based on her race. The facts and evidence as set forth in the Investigative Memorandum do not support [Ms. Zhang]'s allegation. The evidence in this matter reveals that [Ms. Zhang] was disciplined because she failed to disclose a criminal conviction on her application for licensure, not because of her race. [Ms. Zhang] failed to provide any competent substantial evidence to prove that she was disciplined based on her race.

The Commission advised Ms. Zhang that she could file a Petition for Relief if she disagreed with the Commission's determination.

On May 20, 2016, Ms. Zhang filed a "Petition for Relief from Unlawful Employment Discrimination" with the Commission. The Commission then referred this matter to DOAH.

On May 30, 2016, Ms. Zhang filed a Motion requesting that Jamison Jessup be recognized as her qualified representative. The undersigned issued an Order on June 6, 2016, denying the aforementioned Motion.

Via an Order issued on June 6, 2016, the undersigned scheduled the final hearing to occur on July 29, 2016.

On June 21, 2016, and after considering several pleadings filed after the Order denying Ms. Zhang's Motion requesting that Jamison Jessup be recognized as her qualified representative, the undersigned reconsidered the aforementioned ruling and issued an Order on June 21, 2016, concluding that authorizing Jamison Jessup to appear as Ms. Zhang's qualified representative was justified under the circumstances of the instant case.

Ms. Zhang filed a Motion on July 14, 2016, requesting that the final hearing scheduled for July 29, 2016, be continued due to a family emergency. On July 15, 2016, the undersigned issued an Order Granting Continuance and requiring the parties to provide by August 8, 2016, mutual dates of availability for the final hearing.

After receiving mutual dates of availability, the undersigned issued a Notice scheduling the final hearing to occur on October 26, 2016.

On September 9, 2016, the Department filed a "Motion to Dismiss Petitioner's Petition for Relief from Unlawful

Employment Discrimination" ("the Motion to Dismiss"). In support thereof, the Department alleged that it had taken no final agency action impacting Ms. Zhang's substantial interests.

After considering Ms. Zhang's Response thereto, the undersigned issued on September 22, 2016, an Order denying the aforementioned Motion to Dismiss:

First of all, [the Department] appears to be arguing in paragraphs one through thirteen of the Motion to Dismiss that [Ms. Zhang] has no standing because [the Department] has not taken final agency action. However, [the Department] cites no authority demonstrating that an agency must have taken final agency action in order to have committed an unlawful employment practice within the meaning of section 768.10(5), Florida Statutes (2016).

In the remaining paragraphs of the Motion to Dismiss, [the Department] argues that the case should be dismissed because the Florida Commission on Human Relations has no jurisdiction to grant the prospective injunctive relief sought by [Ms. Zhang]. However, prospective injunctive relief is not the only remedy available to one victimized by a violation of section 760.10(5), Florida Statutes. See §§ 760.07 & 760.11(5), Fla. Stat.

The undersigned convened a telephone conference on October 21, 2016, in order to notify the Parties of an unexpected difficulty in scheduling an interpreter for the final hearing in this matter. However, during the course of that phone conference, Ms. Zhang's qualified representative stated that Ms. Zhang may no longer wish to proceed with her unlawful

discrimination claim. As a result, the undersigned canceled the final hearing scheduled for October 26, 2016, and required Ms. Zhang's qualified representative to file a status report by October 27, 2016, providing notice as to whether Ms. Zhang wished to proceed with her case.

On October 27, 2016, Ms. Zhang's Qualified Representative filed a Status Report stating that she wanted to continue prosecuting her unlawful discrimination claim. As a result, the undersigned issued an Order on October 31, 2016, requiring the Parties to provide mutual dates of availability in December of 2016 and January of 2017, for a final hearing in this matter.

On November 28, 2016, the undersigned issued an Order re-scheduling the Final Hearing for January 27, 2017.

After Ms. Zhang's Qualified Representative provided notice on November 30, 2016, that he was unavailable due to a previously-scheduled hearing on January 27, 2017, the undersigned re-scheduled the final hearing to occur on February 16, 2017. In doing so, the undersigned specified that

[t]he undersigned will not entertain any requests for a continuance based on any type of scheduling conflict or unavailability unless that request is filed within 7 days from the date of this Order. Even if such a request is timely-filed, the undersigned may still deny the request. In addition, any requests for a continuance or abatement filed beyond the aforementioned deadline and based on a different justification will not be granted without a compelling

demonstration of good cause. Please be advised that ongoing settlement negotiations shall not be considered good cause for an additional continuance or abatement.

(emphasis in original).

On February 15, 2017, the Department filed a Motion in Limine seeking to prevent the introduction of any argument or evidence regarding an ongoing disciplinary case against Ms. Zhang.

The undersigned convened the final hearing as scheduled on February 16, 2017. During the course of the Final Hearing, Ms. Zhang testified on her own behalf, and the undersigned accepted Petitioner's Exhibits 1 through 5 into evidence. The Department introduced the testimony of Oaj Gilani, and the undersigned accepted Respondent's Exhibits 1 through 13 into evidence. In addition, the undersigned denied the Department's Motion in Limine.

The Transcript from the final hearing was filed with DOAH on March 16, 2017.

On March 24, 2017, Ms. Zhang's Qualified Representative filed a Motion requesting that the deadline for submitting the parties' proposed recommended orders be extended from March 27, 2017, to April 10, 2017.

The undersigned issued an Order on March 27, 2017, granting the aforementioned Motion.

Both parties timely-filed their Proposed Recommended Orders, and the undersigned considered both Proposed Recommended Orders in the preparation of the instant Recommended Order.

FINDINGS OF FACT

1. Ms. Zhang was born in Chongqing, China in 1970, and speaks Mandarin Chinese.

2. Her comprehension of spoken and written English is very limited.

3. Ms. Zhang moved to the United States in December of 2003 and stayed in the United States until she returned to China in December of 2005.

4. Ms. Zhang returned to the United States in November of 2009.

5. Ms. Zhang elected to pursue a career as a massage therapist and graduated from VIP Beauty School on February 24, 2012.

6. On approximately May 15, 2012, Ms. Zhang filed an initial application for licensure as a massage therapist.

7. At the time of Ms. Zhang's application, the Department^{1/} did not offer an application written in Mandarin Chinese, and Ms. Zhang did not ask the Department to provide such an application.

8. With the assistance of others, Ms. Zhang was able to complete the application.^{2/}

9. The application completed by Ms. Zhang had a section entitled "Criminal History" that asked if the applicant had "ever been convicted of, or entered a plea of guilty, nolo contendere, or no contest to, a crime in any jurisdiction other than a minor traffic offense."

10. Ms. Zhang responded to the aforementioned question by answering "no."

11. Ms. Zhang acknowledged marking a box on the application that

I have carefully read the questions on the foregoing application and have answered them completely, without reservation of any kind, and I declare that my answers and all statements made by me herein and in support of this application are true and correct. Should I furnish any false information on or in support of this application, I understand that such action shall constitute cause for denial, suspension, or revocation of any license to practice in the State of Florida in the profession for which I am applying.

12. On July 21, 2012, the Department issued a massage therapist license to Ms. Zhang.

13. The Department renewed Ms. Zhang's license on July 26, 2013, and June 11, 2015. Ms. Zhang currently works for a spa in Miami.

14. On April 2, 2015, the Department received information indicating that Ms. Zhang had been arrested for two counts of misdemeanor prostitution on April 5, 2005, in Suffolk County,

New York. According to the information received by the Department, Ms. Zhang entered a guilty plea to one count of disorderly conduct on May 18, 2005, and was sentenced to pay \$295 in fines and/or court costs.

15. After conducting an investigation, the Department issued an Administrative Complaint on November 24, 2015, alleging that Ms. Zhang violated section 480.046(1)(a), Florida Statutes (2011).

16. The aforementioned statute subjected massage therapist licensees to discipline for "[a]ttempting to procure a license to practice massage by bribery or fraudulent misrepresentation."

17. On March 4, 2016, the Department issued a "First Amended Administrative Complaint" which did not contain the allegation that Ms. Zhang violated section 480.046(1)(a). Instead, the Department alleged that Ms. Zhang violated section 480.046(1)(o), Florida Statutes (2011), by violating section 456.072(1)(w), Florida Statutes (2011).

18. Section 480.046(1)(o) subjects massage therapist licensees to discipline for "[v]iolating any provision of this chapter or chapter 456, or any rules adopted pursuant thereto." Section 456.072(1)(w), prohibits licensees in health professions and occupations from

[f]ailing to comply with the requirements for profiling and credentialing, including, but not limited to, failing to provide

initial information, failing to timely provide updated information, or making misleading, untrue, deceptive, or fraudulent representations on a profile, credentialing, or initial or renewal licensure application.

19. As of the final hearing date, the Department's prosecution of Ms. Zhang was ongoing.

20. Ms. Zhang argues that the Department has discriminated against her based on her national origin and thus violated section 760.10(5), Florida Statutes (2016), by: (a) failing to provide her with a licensure application written in Mandarin Chinese; and by (b) failing to dismiss its Administrative Complaint after receiving notice that it had unlawfully discriminated against her.

21. As explained below, Ms. Zhang has: (a) failed to present any direct evidence that the Department intentionally discriminated against her; and (b) failed to establish a prima facie case of discrimination via circumstantial evidence.

CONCLUSIONS OF LAW

22. DOAH has jurisdiction over the subject matter and the parties hereto pursuant to sections 120.569 and 120.57(1), Florida Statutes (2016).

23. The Florida Civil Rights Act of 1992 ("the FCRA") is codified in sections 760.01 through 760.11, Florida Statutes, (2016).

24. Section 760.10(5), Florida Statutes (2016), provides that

[w]henever, in order to engage in a profession, occupation, or trade, it is required that a person receive a license, certification, or other credential, become a member or an associate of any club, association, or other organization, or pass any examination, it is an unlawful employment practice for any person to discriminate against any other person seeking such license, certification, or other credential, seeking to become a member or associate of such club, association, or other organization, or seeking to take or pass such examination, because of such other person's race, color, religion, sex, pregnancy, national origin, age, handicap, or marital status.

25. Section 760.02(6), Florida Statutes (2016), defines a "person" to include "the state; or any governmental entity or agency."

26. Discriminatory intent can be established through direct or circumstantial evidence. Schoenfeld v. Babbitt, 168 F.3d 1257, 1266 (11th Cir. 1999). Direct evidence of discrimination is evidence that, if believed, establishes the existence of discriminatory intent behind an employment decision without inference or presumption. Maynard v. Bd. of Regents, 342 F.3d 1281, 1289 (11th Cir. 2003).

27. "Direct evidence is composed of only the most blatant remarks, whose intent could be nothing other than to

discriminate on the basis of some impermissible factor.”

Schoenfeld, 168 F.3d at 1266.

28. With regard to the instant case, Ms. Zhang has presented no direct evidence demonstrating that the Department intentionally discriminated against her. For example, Ms. Zhang acknowledged during her testimony that she did not request that the Department provide her with an initial licensure application written in Mandarin Chinese. Also, the Department did nothing to prevent Ms. Zhang from obtaining assistance with completing the application. Furthermore, while the Department is undoubtedly now aware of Ms. Zhang’s lack of proficiency with English, the Department has a legitimate basis for prosecuting her because Ms. Zhang did not disclose her conviction on her initial licensure application.

29. Because there is no direct evidence of any discriminatory intent on the Department’s part, the analysis must turn to whether there is any circumstantial evidence. See generally Yang v. Tradestation Technologies, Inc., Case No. 14-1916, ¶40 (Fla. DOAH Dec. 31, 2015) (dismissed with prejudice prior to final order) (concluding “[t]he record is devoid of any direct evidence of national origin discrimination. Accordingly, Petitioner’s claim is analyzed pursuant to the McDonnell-Douglas burden shifting analysis.”).

30. Complainants may establish a prima facie case via circumstantial evidence through the burden-shifting test established by the United States Supreme Court in McDonnell-Douglas Corp. v. Green, 411 U.S. 792, 802-05 (1973).

31. Under the McDonnell-Douglas analysis, a complainant establishes a prima facie case of national origin discrimination by demonstrating that: (a) she is a member of a protected class; (b) that she was subjected to an adverse employment action; (c) the respondent treated similarly-situated people who were not members of the protected class more favorably; and that (d) she was qualified to perform the task at issue.

32. In the instant case, Ms. Zhang has demonstrated that she is a member of a protected class due to her national origin. See generally Yang, ¶41 (concluding that “[t]he first two elements for the foregoing test are satisfied, as Respondent stipulates that Petitioner is a member of [a] protected class with an Asian national origin and that Petitioner was subject[ed] to an adverse employment action when he was terminated on October 9, 2012.”).

33. However, in light of the fact that the Department approved Ms. Zhang’s initial licensure application, the undersigned cannot conclude that Ms. Zhang was subjected to an adverse employment action when she applied for her massage therapist license.

34. Even if the Department's prosecution of Ms. Zhang for her failure to disclose her prior conviction could be characterized as an adverse employment action, Ms. Zhang presented no evidence that the Department provided more favorable treatment for comparable acts to those outside Ms. Zhang's protected class. In other words, there is no evidence that the Department has declined to prosecute anyone else who failed to disclose a prior conviction on a licensure application.^{3/} See generally Yang, ¶43 (concluding that "Petitioner failed to prove the third element, that Respondent treated similarly-situated employees not of his protected class more favorably. In order to make a valid comparison, Petitioner must show that he and the comparators he identifies are similarly-situated in all relevant respects.").

35. Accordingly, Ms. Zhang has failed to demonstrate a prima facie case of discrimination. See generally Yang, ¶44 (concluding "Petitioner failed to demonstrate that Respondent treated similarly-situated employees who were not of Asian national origin more favorably than he was treated, and, therefore, no prima facie case of discrimination on the basis of national origin has been demonstrated.").

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Florida Commission on Human

Relations issue a final order dismissing Xianshu Zhang's
Petition for Relief.

DONE AND ENTERED this 9th day of May, 2017, in Tallahassee,
Leon County, Florida.

Garnett Chisenhall

G. W. CHISENHALL
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Filed with the Clerk of the
Division of Administrative Hearings
this 9th day of May, 2017.

ENDNOTES

^{1/} The Board of Massage Therapy ("the Board") is under the Department's administrative umbrella. § 480.035(1), Fla. Stat. (2016) (providing that the "Board of Massage Therapy is created within the department."). The Department provides investigative services to the Board and administers the licensure process. See generally § 480.039, Fla. Stat. (2016) (providing that "[t]he department shall provide all investigative services required in carrying out the provisions of this act."); § 480.042(3), Fla. Stat. (2016) (providing that "[t]he department shall, in accordance with rules established by the board, examine persons who file applications for licensure under this act in all matters pertaining to the practice of massage.").

^{2/} Ms. Zhang testified that she was able to pass the written examination required of prospective massage therapist licensees by memorizing key words. Also, Ms. Zhang testified that she "practiced" English much more frequently prior to taking the exam. Finally, a portion of her testimony suggested that she

may have taken the exam multiple times prior to achieving a passing score.

^{3/} Ms. Zhang's discrimination complaint appears to be a collateral attack on the Department's prosecution. It also appears that Ms. Zhang's lack of proficiency in English could be more appropriately raised as a defense to the Department's charges or as grounds for mitigation. See generally Gandy v. Trans World Computer Tech. Group, 787 So. 2d 116 (Fla. 2d DCA 2001) (proving fraud requires a showing that the person making a statement knows, at the time the statement is made, that it is false."); McGraw v. Dep't of State, Div. of Licensing, 491 So. 2d 1193, 1195 (Fla. 1st DCA 1986) (stating that "[t]o the extent that appellant's petition for hearing sought to present mitigation, an informal hearing under Section 120.57(2), would have provided a forum more than adequate for such purpose.").

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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.