

6-15-04

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

FILED
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DIVISION OF ADMINISTRATIVE HEARINGS

YVONNE C. COX,

EEOC Case No. 15D-1001083

Petitioner,

FCHR Case No. 23-03336

v.

AP

DOAH Case No. 03-4672

EJD-CWS

UNIVERSITY OF FLORIDA,

FCHR Order No. 04-145

Respondent.

**FINAL ORDER DISMISSING PETITION FOR
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

Preliminary Matters

Petitioner Yvonne C. Cox filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2001), alleging that Respondent University of Florida committed unlawful employment practices on the basis of Petitioner's disability (dyslexia) when it failed to hire Petitioner for the positions for which she had applied.

The allegations set forth in the complaint were investigated, and, on October 27, 2003, the Executive Director issued his determination finding that there was no reasonable cause to believe that an unlawful employment practice had occurred.

Petitioner filed a Petition for Relief from an Unlawful Employment Practice, and the case was transmitted to the Division of Administrative Hearings for the conduct of a formal proceeding.

An evidentiary hearing was held in Gainesville, Florida, on March 11, 2004, before Administrative Law Judge Ella Jane P. Davis.

Judge Davis issued a Recommended Order of dismissal, dated June 15, 2004.

Pursuant to notice, public deliberations were held on October 28, 2004, by means of Communications Media Technology (namely, telephone) before this panel of Commissioners. The public access point for these telephonic deliberations was the Office of the Florida Commission on Human Relations, 2009 Apalachee Parkway, Suite 100, Tallahassee, Florida, 32301. At these deliberations, the Commission panel determined the action to be taken on the Petition for Relief.

Findings of Fact

We find the Administrative Law Judge's findings of fact to be supported by competent substantial evidence.

We adopt the Administrative Law Judge's findings of fact.

Conclusions of Law

We find the Administrative Law Judge's application of the law to the facts to result in a correct disposition of the matter.

The Administrative Law Judge concluded that to establish a prima facie case of handicap discrimination a complainant must show that "[A.] He is handicapped within the meaning of the Florida Civil Rights Act; [B.] He was otherwise qualified for his job; and [C] He was harassed, terminated, (or, in this case, not hired) solely by reason of his handicap." Recommended Order, ¶ 31.

We note that the test cited by the Administrative Law Judge is set out in Brand v. Florida Power Corporation, 633 So. 2d 504 (Fla. 1st DCA 1994), at page 510. The Brand decision identifies three types of handicap discrimination cases: first, one in which the employer contends the employment decision was made for reasons unrelated to the person's handicap; second, one wherein the employer contests the plaintiff's claim that he or she is a qualified handicapped person who, with reasonable accommodation, can perform the essential functions of the job in question; and third, one in which the employer asserts it is unable to provide the accommodation necessary, because it would impose an undue hardship on its operations. See Brand, at 508, footnote 5. That particular test cited by the Administrative Law Judge was applicable in the Brand case because the Brand case fell into the second category of cases listed above. The instant case falls into the first category of cases, and, thus, the test cited by the Administrative Law Judge is inappropriate for this case.

In Blum v. National Enquirer, Inc., 21 F.A.L.R. 426 (FCHR 1998), a Commission panel adopted conclusions of law which indicated that to establish a prima facie case of "handicap" discrimination in "failure to hire" cases "where the employer contends the employment decision was made for reasons unrelated to the person's handicap," Petitioner must show, "(i) that he belongs to [a] protected group; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications he was rejected; and (iv) that, after his rejection, the position remained open, the employer continued to seek applicants from persons of complainant's qualifications."

We modify accordingly the Administrative Law Judge's conclusions of law regarding the establishment of a prima facie case of handicap discrimination.

In modifying these conclusions of law of the Administrative Law Judge, we conclude: (1) that the conclusions of law being modified are conclusions of law over which the Commission has substantive jurisdiction, namely conclusions of law stating what must be demonstrated to establish a prima facie case of unlawful discrimination under the Florida Civil Rights Act of 1992; (2) that the reason the modifications are being made by the Commission is that the conclusions of law as stated run contrary to previous Commission decisions on the issue; and (3) that in making these modifications the

conclusions of law being substituted are as or more reasonable than the conclusions of law which have been rejected. See, Section 120.57(1)(l), Florida Statutes (2003).

The error committed by the Administrative Law Judge regarding the test for establishing a prima facie case handicap discrimination is harmless since the Administrative Law Judge found that Petitioner is not handicapped (disabled) within the meaning of the law. Recommended Order, ¶ 32.

The Administrative Law Judge also concluded that the Petition for Relief was untimely and that the case was, therefore, time-barred. Recommended Order, ¶ 27.

The Florida Civil Rights Act of 1992 states that when a “no cause” determination has been issued, as in the instant case, the aggrieved person may request an administrative hearing within 35 days of the date of that determination, and if the request is not made within that 35-day time period, “the claim will be barred.” Section 760.11(7), Florida Statutes (2003).

In the instant case, the Administrative Law Judge found that the “no cause” determination was issued on October 27, 2003, the Petition for Relief was filed on December 3, 2003, and 35 days from the date of the determination was December 1, 2003. Recommended Order, ¶ 27.

Because the Administrative Law Judge decided the case on the merits in favor of Respondent, and we, herein, have found that the Administrative Law Judge’s finding that no unlawful employment practice occurred is supported by competent substantial evidence in the record, we conclude it is unnecessary for the Commission to either accept or reject the conclusion of law that the Petition for Relief was untimely. Accord, Cesarin v. Dillards, Inc., FCHR Order No. 03-037 (April 29, 2003).

With the indicated correction and comment, we adopt the Administrative Law Judge’s conclusions of law.

Exceptions

Petitioner submitted two documents to the Commission following the issuance of the Recommended Order. Both are letters to Florida Commission on Human Relations Chief Legal Counsel, Cecil Howard, one dated June 29, 2004, and one dated July 5, 2004.

The July 5, 2004, document was received by the Commission on July 7, 2004, well past the 15-day time period from the date of the Recommended Order for filing exceptions. See, Recommended Order, Notice of Right to Submit Exceptions; Section 120.57(1)(k), Florida Statutes (2003); and Fla. Admin. Code R. 28-106.217(1). The document contains no exceptions to the Recommended Order.

The June 29, 2004, document was received in a timely manner, but also contains very little in the way of specific exceptions to the Recommended Order. The letter states, “...statement in Preliminary Statement misconstrued, the majority of the information has been quoted incorrectly as well as my statements and dates of submission of documents. What is meant by someone knew Petitioner had some type of problem on page 23?” It

would appear that it could be said that, generally, the document excepts to the Administrative Law Judge's finding that no unlawful employment practice occurred.

We have found that the Administrative Law Judge's findings of fact are supported by competent substantial evidence, and that the Administrative Law Judge's application of the law to facts has resulted in a correct disposition of the matter.

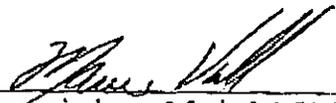
Petitioner's exceptions are rejected.

Dismissal

The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this Order is filed with the Clerk of the Commission. Explanation of the right to appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure 9.110.

DONE AND ORDERED this 4th day of November, 2004.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:



Commissioner Mario M. Valle,
Panel Chairperson;
Commissioner Roosevelt Paige; and
Commissioner Alctta Shutes

Filed this 4th day of November, 2004,
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, FL 32301
(850) 488-7082

NOTICE TO COMPLAINANT / PETITIONER

As your complaint was filed under Title VII of the Civil Rights Act of 1964, which is enforced by the U.S. Equal Employment Opportunity Commission (EEOC), you have the right to request EEOC to review this Commission's final agency action. To secure a "substantial weight review" by EEOC, you must request it in writing within 15 days of your receipt of this Order. Send your request to Miami District Office (EEOC), One Biscayne Tower, 2 South Biscayne Blvd., Suite 2700, 27th Floor, Miami, FL 33131.

Copies furnished to:

Yvonne C. Cox
Post Office Box 772
Williston, FL 32696

University of Florida
c/o Charles M. Deal, Esq.
123 Tigert Hall
Gainesville, FL 32611-2703

Ella Jane P. Davis, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 4th day of NOVEMBER, 2004.

By: *Violet Crawford*
Clerk of the Commission
Florida Commission on Human Relations