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**STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS**

DA JIN PENG,

Petitioner,

v.

**CASE NO.: 16-4347
2016-00617**

UNIVERSITY OF SOUTH FLORIDA,

Respondent.

_____/

JOINT MOTION FOR CLARIFICATION OF ISSUES FOR FINAL HEARING

Pursuant to Florida Administrative Code Rule 28-106.204, Petitioner Da Jin Peng (“Petitioner”) and the University of South Florida Board of Trustees (“USF”) (collectively, the “parties”) file this joint motion requesting that the Administrative Law Judge (“ALJ”) clarify that the issue to be considered at the upcoming final hearing is limited to whether the Florida Commission on Human Relations (“FCHR”) has jurisdiction to investigate the allegations contained in Petitioner’s complaint of discrimination. The parties state the following in support thereof:

Background

1. On June 15, 2016, the FCHR issued a determination of “no jurisdiction” with regard to Petitioner’s complaint of discrimination. Specifically, the FCHR determined that Petitioner’s allegations were untimely and, therefore, the FCHR had no authority to conduct an investigation into his complaint.

2. On July 27, 2016, Petitioner filed his Petition for Relief, requesting that the FCHR enter an order finding that “it has jurisdiction to make a determination” regarding Petitioner’s complaint. Petition for Relief, at 6.

3. On September 14, 2016, the ALJ entered a Notice of Hearing by Video Teleconference, setting the final hearing in this matter for November 7, 2016. Three hours have been reserved for the hearing, consistent with the parties’ proposal in their Joint Response to Initial Order filed on September 13, 2016.

4. The Notice of Hearing by Video Teleconference identifies two issues to be addressed during the final hearing: “Whether the FCHR has jurisdiction over this matter, and if so, whether Respondent violated the Florida Civil Rights Act, as amended, as alleged in the Charge of Discrimination dated April 29, 2015.”

5. The parties now respectfully move for clarification regarding the scope of issues to be considered during the final hearing, and request that the ALJ enter an order limiting the issue to whether the FCHR has jurisdiction to investigate the allegations contained in Petitioner’s complaint of discrimination.

Argument

Where the FCHR has issued a determination of no jurisdiction (as opposed to a determination of reasonable cause or no reasonable cause), the issue before the Division of Administrative Hearings (“DOAH”) is properly limited to whether jurisdiction exists. For example, in *McShane v. Brevard County Sheriff’s Office*, FCHR Order No. 02-089, at *1-2 (Fla. Comm’n on Human Relations Nov. 8, 2002), the Administrative Law Judge found that DOAH had no jurisdiction to consider the merits of a petition filed in response to an FCHR determination of no jurisdiction, and that the petition was improperly referred to DOAH. The FCHR later remanded

the matter to the Administrative Law Judge, on the grounds that Florida Administrative Code Rule 60Y-5.008(1) permitted referral of the petition, but only for the limited purpose of issuing recommended findings on the jurisdictional issue. *Id.* at *2-4

The scope of issues has similarly been limited in subsequent cases arising from determinations of no jurisdiction. *See Cherrington v. Barry University, et al*, FCHR Order No. 07-047, at *2 (Fla. Comm’n on Human Relations Aug. 31, 2007) (explaining that the issue before Administrative Law Judge was “not whether the alleged discrimination occurred, but whether the Florida Civil Rights Act of 1992 confers jurisdiction,” where FCHR had issued determination of no jurisdiction); *Fishbaugh v. Brevard County Sheriff’s Dep’t*, FCHR Order No. 04-103, at *4 (Fla. Comm’n on Human Relations Aug. 23, 2004) (remanding petition to FCHR for investigation upon finding that jurisdiction existed over allegations of sex discrimination). (Copies of all Orders cited in this Motion are attached as Composite Exhibit A).

Here, as in the above cases, the FCHR issued a determination of no jurisdiction, finding that it lacked authority to investigate Petitioner’s complaint of discrimination. Thus, the issue before the Administrative Law Judge is whether jurisdiction exists, not whether a violation occurred. It would be premature to require the parties to present their cases on the merits where the FCHR has yet to conduct any substantive investigation into Petitioner’s allegations or issue a determination as to reasonable cause, particularly where such a trial on the merits may be rendered moot depending on the jurisdictional finding.

Conclusion

For the foregoing reasons, the parties respectfully request that the ALJ enter an order clarifying that the issue to be considered at the final hearing in this matter is limited to whether the FCHR has jurisdiction to conduct an investigation into Petitioner’s allegations.

Date: September 19, 2016

s/ Craig S. Dawson

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was furnished by U.S. mail this 19th day of September, 2016 to Richard F. Meyers, Esquire, The Meyers Firm, P.A., P.O. Box 16308, Temple Terrace, Florida 33687-6308.

s/ Craig S. Dawson

Attorney

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

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JOANNE WHITAKER MCSHANE,

EEOC Case No. 15D996018

Petitioner,

FCHR Case No. 99-04139

v.

DOAH Case No. 01-4449

DMK
closed

BREVARD COUNTY SHERIFF'S
OFFICE,

FCHR Order No. 02-089

Respondent.

ORDER REMANDING PETITION FOR RELIEF
FROM AN UNLAWFUL EMPLOYMENT PRACTICE

Preliminary Matters

This cause came before the Commission for review of the Recommended Order of Dismissal issued in this matter on June 24, 2002, by Administrative Law Judge J. D. Parrish.

Pursuant to notice, public deliberations were held on October 22, 2002, 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 Recommended Order of Dismissal.

Findings of Fact and Conclusions of Law

The Administrative Law Judge found that Petitioner had filed a Charge of Discrimination with the Commission alleging that Respondent had discriminated against Petitioner on the basis of retaliation, that the Commission had issued a "Notice of Determination: No Jurisdiction" in this matter, and that Petitioner subsequently filed a Petition for Relief with the Commission which was transmitted to Division of Administrative Hearings (DOAH). See Recommended Order, Preliminary Matters section. The Administrative Law Judge found that under these circumstances, DOAH did not have jurisdiction to consider the merits of Petitioner's claim, but that DOAH did have jurisdiction to determine whether the Commission appropriately referred this matter to DOAH for a formal administrative hearing. *Id.*

The Administrative Law Judge concluded that the Commission, by rule, attempted to expand its jurisdiction and that of DOAH to include cases where the Commission issued a Notice of Failure of Conciliation, a Notice of Determination of No Reasonable Cause, a Notice of Determination of No Jurisdiction or a Notice of Determination of Untimeliness. See

Recommended Order, Conclusions of Law, ¶ 6. The Administrative Law Judge concluded that the Commission could not expand its jurisdiction, nor that of DOAH, to determine the merits of cases other than those in which the complainant elects a DOAH hearing after a finding of reasonable cause, or is required to go through one following a finding that there is no reasonable cause, and that in the instant case neither of those conditions precedent were met. Id.

The Administrative Law Judge recommended that the Commission resume jurisdiction of this matter and complete the investigation of the Charge of Discrimination or permit Petitioner to make her election of remedies pursuant to Section 760.11(8), Florida Statutes. See Recommended Order, Recommendation section.

We conclude that the Administrative Law Judge committed an error of law in not resolving disputed issues of material fact regarding whether the Commission has jurisdiction of this matter, and in failing to issue a Recommended Order to the Commission resolving those issues.

The Administrative Law Judge noted that the statute enabling the Commission to adopt rules, “only empowers the FCHR ‘[t]o adopt, promulgate, amend, and rescind rules to effectuate the purposes and policies of the Florida Civil Rights Act of 1992 and govern the proceeding[s] (sp.) of the commission, in accordance with Chapter 120,’ citing Section 760.06(12), Florida Statutes. Recommended Order, Conclusions of Law, ¶ 6.

As stated, above, the Administrative Law Judge concluded that the Commission “nonetheless attempted to expand the instances where it could refer matters to the DOAH through rulemaking, where complaints of employment discrimination included instances in which the FCHR has issued ‘a Notice of Failure of Conciliation, a Notice of Determination of No Reasonable Cause, a Notice of Determination of No Jurisdiction or a Notice of Determination of Untimeliness.’ Rule 60Y-5.008, Florida Administrative Code (2001).” Id.

The Administrative Law Judge is correct that the Commission’s rules provide that a complainant may file a Petition for Relief from an Unlawful Employment Practice after the service of a Notice of Failure of Conciliation, a Notice of Determination of No Reasonable Cause, a Notice of Determination of No Jurisdiction or a Notice of Determination of Untimeliness. See Fla. Admin. Code R. 60Y-5.008(1).

The Commission’s rules also reflect that if the investigation of a case yields a recommendation to the Executive Director based upon a lack of jurisdiction over the Respondent or subject matter of the complaint, the Executive Director may dismiss the complaint pursuant to Fla. Admin. Code R. 60Y-5.006(11) (dealing with administrative dismissals by the Executive Director), “provided that the investigation does not reveal any disputed issues of material fact. The Executive Director shall issue a determination on the foregoing [basis] of lack of jurisdiction...where disputed issues of material fact appear to exist.” Fla. Admin. Code R. 60Y-5.004(2).

In this case, the Executive Director issued a determination as opposed to dismissing the case administratively, in accordance with the above-cited Commission rule.

In our view, the Administrative Law Judge minimizes the authority the Commission has to promulgate rules by using the word “only” in stating that the statute section that grants the

Commission the authority to make rules, "only empowers the FCHR '[t]o adopt, promulgate, amend, and rescind rules to effectuate the purposes and policies of the Florida Civil Rights Act of 1992 and govern the proceeding[s] (sp.) of the commission, in accordance with Chapter 120.'" Recommended Order, Conclusions of Law, ¶ 6.

Actually, the Florida Civil Rights Act of 1992 contains two provisions granting rulemaking authority to the Commission, the section cited by the Administrative Law Judge and a subsection of Section 760.11, Florida Statutes, entitled "Administrative and civil remedies; construction," which states, "The commission may adopt, promulgate, amend, and rescind rules to effectuate the purposes and policies of this section and to govern the proceedings of the commission under this section." Section 760.11(14), Florida Statutes (2001).

To restate, this second grant of rulemaking authority specifically grants to the Commission the authority to adopt, promulgate, amend and rescind rules "to govern the proceedings of the commission under this section." *Id.*

In our view, the rules cited by the Administrative Law Judge as improperly expanding the instances where the Commission could refer matters to DOAH, simply govern, as specifically authorized by the Legislature, the proceedings of the Commission as it determines whether it has jurisdiction over a case filed with it.

Finally, it should be noted that DOAH has in the past accepted from the Commission the transmittal of a Petition for Relief following the issuance of a "Notice of Determination: No Jurisdiction," and made findings of fact and conclusions of law as to whether DOAH and the Commission had jurisdiction of the matter. In that instance, the Administrative Law Judge issued a Recommended Order of Dismissal, finding facts that reflected that the site of the discrimination alleged was a federal enclave, and making conclusions of law that, therefore, DOAH and the Commission did not have jurisdiction of the matter, and ultimately recommending that the Commission dismiss the Petition for Relief with prejudice. See Faulconer v. Tracor Services Corporation, 22 F.A.L.R. 1752 (FCHR 1999).

In making the indicated correction to the conclusions of law of the Administrative Law Judge, we find: (1) that the Administrative Law Judge's conclusions of law being corrected are within the substantive jurisdiction of the Florida Commission on Human Relations, namely the interpretation of administrative rules promulgated by the Commission; (2) that the reason the correction is being made is that the conclusions of law as stated by the Administrative Law Judge run contrary to the Commission's rules; and (3) that in making this correction the conclusions of law being substituted are as or more reasonable than the conclusions which have been rejected. See, Section 120.57(1)(l), Florida Statutes (2001).

Exceptions

Respondent filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Respondent's Exceptions to Recommended Order."

Respondent objects to the Administrative Law Judge's recommendation that the Commission resume jurisdiction of the matter and complete the investigation of the Charge of

Discrimination. Specifically, Respondent argues that, since the Commission determined that it lacked jurisdiction over the charge, the Commission is now without authority to resume jurisdiction and reinstate an investigation or render a determination with regard to cause. Respondent argues that if the determination of jurisdiction made by the Commission is not subject to review by DOAH, as determined by the Administrative Law Judge, then the Commission's determination can only be deemed to constitute final agency action, and the proper avenue for further review would be an appropriate District Court of Appeal. See Filing.

Because the Administrative Law Judge made no findings or recommendation on the issue of jurisdiction, and because, in our view, as discussed above, the Commission has the authority to transmit the matter to the Administrative Law Judge for recommended findings on the jurisdiction issue, it is unnecessary at this point to reach the issue of the Commission's jurisdiction to investigate the matter further, and for this reason Respondent's exceptions are rejected.

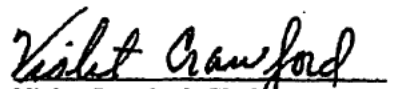
Remand

This matter is hereby REMANDED to the Administrative Law Judge for further proceedings on the Petition for Relief.

DONE AND ORDERED this 8th day of November, 2002.
FOR THE COMMISSION ON HUMAN RELATIONS:


Commissioner Gayle Cannon,
Panel Chairperson;
Commissioner Aletta Shutes; and
Commissioner Billy Whitefox Stall

Filed this 8th day of November, 2002,
in Tallahassee, Florida.


Violet Crawford, Clerk
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FCRH Order No. 02-089

Page 5

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STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

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JANNEL CHERRINGTON,

Petitioner,

v.

BARRY UNIVERSITY,
SNHS-ANESTHESIOLOGY,

Respondent.

EEOC Case No. 15D200603593

FCHR Case No. 2006-01744

DOAH Case No. 06-4648

FCHR Order No. 07-047

JANNEL CHERRINGTON,

Petitioner,

v.

WOLVERINE ANESTHESIA
CONSULTANTS,

Respondent.

EEOC Case No. 15D200603593

FCHR Case No. 2006-01691

DOAH Case No. 06-4650

FCHR Order No. 07-047

ORDER REMANDING COMPLAINTS OF DISCRIMINATION
TO COMMISSION'S OFFICE OF EMPLOYMENT INVESTIGATIONS
FOR INVESTIGATION

This matter is before the Commission for consideration of the Recommended Order, dated June 1, 2007, issued in the above-styled consolidated cases by Administrative Law Judge Robert E. Meale.

Pursuant to notice, public deliberations were held on August 22, 2007, 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 Recommended Order.

Findings of Fact and Conclusions of Law

Petitioner Jannel Cherrington alleged that Respondent Barry University SNHS-Anesthesiology discriminated against her on the basis of her race (Black) by terminating her from a graduate nursing program and alleged that Respondent Wolverine Anesthesia Consultants discriminated against her on the basis of her race (Black) in the clinical portion of the graduate nursing program in which Petitioner was enrolled by assigning her to a certified registered nurse anesthetist longer than it assigned non-Black students even though her skill average was well above average.

The issue in these consolidated cases is not whether the alleged discrimination occurred, but whether the Florida Civil Rights Act of 1992 confers jurisdiction over the Respondents to the Commission and Division of Administrative Hearings. (The Commission's investigation yielded a "Determination: No Jurisdiction" in both the cases.)

Judge Meale recommended the Commission dismiss the Petitions for Relief in these consolidated cases, concluding that the relationship between Petitioner and Respondents did not convey jurisdiction over the Respondents.

Specifically, the Administrative Law Judge concluded that jurisdiction did not exist in this case because neither Respondent is Petitioner's "employer" within the meaning of the Florida Civil Rights Act of 1992 (Recommended Order, ¶ 23), and that neither Respondent is a covered individual with regard to the section of the Florida Civil Rights Act of 1992 dealing with discrimination in licensing (Recommended Order, ¶ 26).

*allegations of discrimination suggesting an employer / employee
relationship between Respondents and Petitioner*

The Florida Civil Rights Act of 1992 states that "[i]t is an unlawful employment practice for an employer.....to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment because of such individual's.....race [emphasis added]." Section 760.10(1), Florida Statutes (2005).

In conclusions of law adopted by a Commission panel, it has been stated, "Absent a showing that [Petitioner] was an applicant for employment or that she became an employee, the Petitioner lacks a statutory basis for seeking relief from an unlawful employment practice." Huth v. National Admark Corporation, FCHR Order No. 01-050 (September 25, 2001), adopting conclusions of law in the Recommended Order of DOAH Case No. 00-4633, dated May 30, 2001.

In a case brought under the predecessor law to the Florida Civil Rights Act of 1992, the Human Rights Act of 1977, as amended, it was found that the Florida Commission on Human Relations properly refused to act on the claim of a student that she was the victim of discrimination when she received a grade of "B" instead of "A" in her German I class, because there was nothing in the law that "suggests the Commission is empowered to investigate and

take other action with regard to alleged discrimination of this sort." See Honig v. Florida Commission on Human Relations, et al., 659 So. 2d 1236 (Fla. 5th DCA 1995).

In the instant case, the Administrative Law Judge concluded that "Petitioner was never hired by either [R]espondent. Thus, as to Petitioner, neither [R]espondent is an employer, so no jurisdiction exists..." Recommended Order, ¶ 23.

Applying the statements of law, above, to the facts found by the Administrative Law Judge, the Administrative Law Judge's conclusion that jurisdiction does not exist, in our view, is a correct application of the law to the facts with regard to Petitioner's allegations of discrimination that suggest that Respondents were her "employers."

*allegations of discrimination in Petitioner's attempt to gain
licensure as a CRNA*

The Florida Civil Rights Act of 1992 states, "Whenever, 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, national origin, age, handicap, or marital status [emphasis added]." Section 760.10(5), Florida Statutes (2005).

We re-emphasize that for this section it is an unlawful employment practice for "any person" to discriminate as indicated, not just an "employer." See, also Section 760.11(1), Florida Statutes (2005) where this is clearly indicated.

The issue before us, then, is whether either Respondent in this case is "any person" within the meaning of this statutory section.

In concluding that neither Respondent fell within this meaning of "any person," the Administrative Law Judge concluded, "Although it is, of course, unnecessary to find an employer-employee status to find liability under a statute addressing discrimination in licensing, neither [R]espondent administered an examination directly required for licensure...Section 760.10(5) is not applicable to educational institutions whose degrees are necessary, but not sufficient, conditions for licensure, any more than this statute is applicable to universities, whose bachelor's degree may be a necessary, but not sufficient, condition to becoming a nurse or a physician...Section 760.10(5) applies instead to entities more directly involved in the licensing process -- in this case, the Council on Certification of Nurse Anesthetists." Recommended Order, ¶ 26.

We respectfully disagree on this issue.

With regard to interpreting the Florida Civil Rights Act of 1992, the Act, itself, states, "The Florida Civil Rights Act of 1992 shall be construed according to the fair import of its terms and shall be liberally construed to further the general purposes stated in this section and the

special purposes of the particular provision involved." Section 760.01(3), Florida Statutes (2005).

As indicated, above, Section 760.10(5), Florida Statutes, prohibits "any person," as opposed to an "employer," from discriminating against another in efforts to attain a license.

The Florida Civil Rights Act of 1992 defines "person" to include "an individual, association, corporation, joint apprenticeship committee, joint-stock company, labor union, legal representative, mutual company, partnership, receiver, trust, trustee in bankruptcy, or unincorporated organization; any other legal or commercial entity; the state; or any governmental entity or agency." Section 760.02(6), Florida Statutes (2005).

In our view, the Respondents fall within this definition of "person." (Note that the Administrative Law Judge found that both Respondents would fall within the statutory definition of "employer," which includes the term "person," although not Petitioner's employer. See Recommended Order, ¶ 17 and Section 760.02(7), Florida Statutes (2005), indicating, "'Employer' means any person...[emphasis added].")

The Administrative Law Judge indicated that "Section 760.10(5) is not applicable to educational institutions whose degrees are necessary, but not sufficient, conditions for licensure, any more than this statute is applicable to universities, whose bachelor's degree may be a necessary, but not sufficient, condition to becoming a nurse or a physician." Recommended Order, ¶ 26. While we agree that in the situation where a bachelor's degree is required to become a physician, the bachelor's degree program seems too distant to be covered as a "person" who could discriminate in another person's attempt to gain licensure as a physician, we do not agree that this is true for the program involved in this case.

The Administrative Law Judge found that Petitioner enrolled at Barry University to fulfill the educational requirements for certification as a Certified Registered Nurse Anesthetist (CRNA). Recommended Order, ¶ 3. The Administrative Law Judge further found that the benefit to Barry of its arrangement to have students placed with Wolverine "is that Wolverine's supervision of its students in the clinical practice allows Barry to offer a comprehensive anesthesiology program that qualifies its students to sit for the CRNA examination." Recommended Order, ¶ 6. Further, the conclusions of law set out by the Administrative Law Judge seem to clearly identify that the successful completion of a "formal post-basic program or awarding of the masters' degree in a nursing clinical specialty" is a requirement for licensure as a CRNA. Recommended Order, ¶ 25.

In our view, this is a different situation from a bachelor's degree that could be used for multiple purposes (e.g., get a job, go to graduate school, go to professional school). Rather, it seems that the sole purpose of the masters degree program Petitioner was enrolled in at Barry University is to enable the students enrolled to attain licensure as a CRNA, and completion of such a program is a specific requirement of licensure.

For this reason, we conclude that the plain meaning of Section 760.10(5), Florida Statutes (2005), would suggest that under the facts of this case Respondents are "persons" who could discriminate against another person as that other person attempts to gain licensure as a CRNA, and that therefore Commission jurisdiction exists in this case as to the allegations brought under

Section 760.10(5), Florida Statutes (2005). Further, since these allegations have not yet been substantively investigated by the Commission, we remand the case to the Commission's Office of Employment Investigations for further investigation leading to the eventual issuance of a Determination of whether there is or is not reasonable cause to believe that Respondents unlawfully discriminated against Petitioner under the provisions of Section 760.10(5), Florida Statutes (2005).

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 the interpretation of a specific provision of 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 are not consistent with the liberal construction of the Florida Civil Rights Act of 1992 required by the provisions of the Florida Civil Rights Act of 1992, itself; 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 (2005).

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Exceptions to Recommended Order by Petitioner," received by the Commission on June 19, 2007.

Petitioner's exceptions take issue with the facts found, facts not found and inferences drawn from the evidence presented.

Petitioner excepts to statements in Recommended Order, ¶ 5 and ¶ 12, that Petitioner "withdrew" from the program, arguing that Petitioner was dismissed from the program. It would seem that Petitioner's testimony on page 245 of Volume II of the transcript that she was "terminated" because she would not accept probation is sufficient for the Administrative Law Judge to draw the inference that Petitioner "withdrew."

Petitioner's exceptions to Recommended Order, ¶ 6 and ¶ 7, essentially suggest revision to or provide comment on facts found regarding the financial relationship of the Respondents.

Petitioner's exceptions to Recommended Order, ¶ 8, ¶ 9, ¶ 10, and ¶ 11, all relate to the inference drawn by the Administrative Law Judge that neither Respondent is Petitioner's employer.

The Commission has stated, "It is well settled that it is the Administrative Law Judge's function 'to consider all of the evidence presented and reach ultimate conclusions of fact based on competent substantial evidence by resolving conflicts, judging the credibility of witnesses and drawing permissible inferences therefrom. If the evidence presented supports two inconsistent findings, it is the Administrative Law Judge's role to decide between them.' Beckton v. Department of Children and Family Services, 21 F.A.L.R. 1735, at 1736 (FCHR 1998), citing Maggio v. Martin Marietta Aerospace, 9 F.A.L.R. 2168, at 2171 (FCHR 1986)." Barr v. Columbia Ocala Regional Medical Center, 22 F.A.L.R. 1729, at 1730 (FCHR 1999).

These exceptions are rejected.

Petitioner excepts to conclusions of law set out at Recommended Order, ¶ 17 through ¶ 23, all of which relate to the ultimate conclusion that Respondents are not Petitioner's "employer" and therefore Commission jurisdiction does not exist over Petitioner's claims of "employment" discrimination.

For reasons discussed in this Order, supra, we conclude that the Administrative Law Judge's application of the law to facts reflects a correct disposition of this issue.

These exceptions are rejected.

Petitioner excepts to the conclusions of law set out in Recommended Order, ¶ 26, which reflect that Respondents are not "persons" who could unlawfully discriminate against Petitioner under Section 760.10(5), Florida Statutes (2005), relating to discrimination against persons attempting to gain a licensure.

For reasons discussed in this Order, supra, this exception is accepted.

Remand

The Complaints of Discrimination are hereby REMANDED to the Commission's Office of Employment Investigations for further investigation consistent with this Order.

DONE AND ORDERED this 30th day of August, 2007.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam, Panel Chairperson;
Commissioner Gayle Cannon; and
Commissioner Onelia A. Fajardo

Filed this 30th day of August, 2007,
in Tallahassee, Florida.



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Robert E. Meale, 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 30th day of August, 2007.

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

11-21-03

COMPOSITE EXHIBIT A

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

CONNIE FISHBAUGH,

Petitioner,

v.

BREVARD COUNTY SHERIFF'S
DEPARTMENT,

Respondent.

EEOC Case No. NONE

FCHR Case No. 22-02697

DOAH Case No. 03-1139

FCHR Order No. 04-103

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DMK-CWS

AP

**ORDER DISMISSING PETITION FOR RELIEF FROM AN UNLAWFUL
EMPLOYMENT PRACTICE ON DISABILITY BASIS AND REMANDING FOR
INVESTIGATION ON GENDER (SEX) BASIS**

Petitioner, CONNIE FISHBAUGH, filed a complaint of discrimination pursuant to Florida Civil Rights Act of 1992, Sections 760.01-760.11, Florida Statutes, alleging that the Respondent, BREVARD COUNTY SHERIFF'S DEPARTMENT, committed an unlawful employment practice causing her to terminate her employment because of disability and gender (sex). The allegations set forth in the complaint were determined to be outside the jurisdiction of the Commission and on February 21, 2003, the Executive Director issued his determination of no jurisdiction. The Petitioner filed a Petition for Relief. The final hearing was placed in abeyance following a telephonic hearing in which the parties agreed to file stipulated facts, briefs and proposals on the issue of whether transsexualism is a disability under the Florida Civil Rights Act of 1992 and whether transsexuals may maintain an action for sex discrimination under said Act.

Administrative Law Judge Daniel M. Kilbride, having considered the filed materials, issued his Recommended Order of Dismissal dated March 21, 2003.

The Commission panel designated below considered the record of this matter and determined the action to be taken on the Recommended Order.

Findings of Fact

The ALJ found that the Petitioner suffered from a Gender Identity Disorder (GID), also known as transsexualism, which is a recognized mental health disorder under both the Diagnostic and Statistical Manual of Mental Disabilities (4th ed.) and the International Classification of Disease (World Health Organization, 10th ed.). The ALJ further goes into the method of treatment and impact of the disorder on the Petitioner, including sex-reassignment therapy. He found that, several years following her surgery, Petitioner applied for a position with the Respondent and successfully completed the required pre-employment medical and psychological testing. She informed them of her transgender status before she applied, and was hired as a

deputy sheriff with no restrictions nor accommodations on her ability to perform the essential functions of her position.

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

Conclusions of Law

As to disability basis

The ALJ concluded that there is no basis for a finding that transsexualism is a disability pursuant to FCRA because the underlying federal law and the regulations that construe the ADA and the Rehabilitation Act specifically exclude the condition of transsexualism as a disability. He concluded that Florida should follow those interpretations. He limited the application of the prior FCHR case of Smith v. City of Jacksonville, Jacksonville Correctional Institute, DOAH # 88-5451, 1991 WL 833882 (1991); FCHR # 86-985 (1992), because it involved a pre-operative transsexual with significant medical disabilities and the facts in the case occurred under the Florida Human Rights Act of 1977 and was prior to the enactment of the Florida Civil Rights Act of 1992 and the federal ADA and the amendments to the Rehabilitation Act. The Panel agreed with his analysis.

Since the Panel determined that transsexualism was not a covered disability under FCRA, it did not need to find that Petitioner established a *prima facie* case of disability discrimination. The Petitioner must establish that (s)he is handicapped within the meaning of the ADA or the Florida Civil Rights Act of 1992 (§760.10, *Florida Statutes* (2000)). *Milton v. Scrivner, Inc.*, 53 F.3d 1118, 1123 (10th Cir.1995); *Brand v. Florida Power Corp.*, 633 So.2d 504, 509-10 (Fla. 1st DCA 1994). This can be shown either by demonstrating a physical impairment that substantially limits one or more of the major life activities and presenting a record of such an impairment; or being regarded as having such impairment. 42 U.S.C. § 12102(2); 29 C.F.R. §§ 1630.2(g), (i).

In the instant case, however, it should be noted that there was no showing that the Petitioner is currently suffering from a disability that is an impairment that substantially limits one or more of the major life activities. In fact, the ALJ specifically found that, prior to undergoing sex-reassignment, Petitioner experienced many of the same impairments found in the Smith case, but that, after undergoing sex-reassignment, Petitioner successfully completed Respondent's required pre-employment medical and psychological testing. She did not have any restrictions or request any accommodations on her ability to perform the essential requirements of her position.

As to sexual discrimination basis

Although Title VII does not contain the specific prohibition found in the ADA and Rehabilitation Acts, it does have a significant case history that is instructive.

The ALJ concluded that Petitioner has alleged that Respondent discriminated against her because she is a transsexual and not because she is a woman. He concluded that the reasoning in Ulane v. Eastern Airlines, Inc. 742 F2d 1081 (7th Cir. 1984) applies in which the court rejected transsexualism as being protected by Title VII and, thus the FCRA. The ALJ further concluded that, although some states have adopted "more liberal definitions of 'sex' to include sexual orientation," there is no statutory nor case law to suggest that Florida is one of those states that has recognized transsexualism as a class protected from discrimination.

Both sides have cited cases where sex discrimination has been found, or not found, involving sexual orientation and gender based harassment. Each side seems to rely upon a major case which is immediately distinguished or not followed in significant cases later heard.

For example, the ALJ relies upon Holloway v Arthur Andersen & Co., 566 F2d 659 (9th Cir. 1977) to support his reliance upon Ulane, *supra*. The Petitioner points out that the same court, in Schwenk v. Hartford, 204 F.3d 1187, at 1201 (9th Cir. 2000) overruled its holding in Holloway by adopting "the logic and language of Price Waterhouse v. Hopkins, 490 U.S. 228 (1989)." Similarly, the reliance of the Petitioner on the expansion of actionable items under Oncale v. Sundowner Offshore Oil Services, Inc., 523 U.S. 75 (1998), is somewhat misplaced by the failure of a number of courts to extend it and often restricting it solely to the facts before the Oncale court; thereby, "distinguishing" that case and its holdings from theirs. See, Simonton v. Runyon, 232 F3d 33 (2nd Cir. 2000); see also, Valdez v. Clayton Industries, 107 Cal Rptr2d 15 (Cal.App.2nd DCA 2001), EEOC v. Harbert-Yeargin, Inc., 266 F3d 498 (6th Cir. 2001); Johnson v. Fresh Mark et al., 2004 WL 1166553 (6th Cir. 2004).

The Price Waterhouse case, however, deals with discrimination of a woman and does not set out a separate "protected class" for transsexuals. Therefore, the issue as posed by the ALJ is somewhat misleading. It would be better stated, "Can a transsexual maintain a case of sex discrimination in the workplace?" The ALJ failed to consider under what conditions may a transsexual, as a woman or man, maintain an action for discrimination based on sex.

Petitioner argues in her exceptions that the ALJ mischaracterizes Petitioner's claim. The ALJ stated that Petitioner has alleged that Respondent discriminated against her because she is a transsexual and not because she is a woman. Petitioner states that her claim is based on a claim of sex (gender) discrimination as a woman where the complainant is perceived not to conform to sex stereotypes or because the complainant has changed sex. The Commission concludes that the reasoning in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), applies where the court found that a claim of discrimination could be found where a perception that a person failed to conform to stereotyped expectations of how a "woman" should look and behave. See, also, Oncale v. Sundowner Offshore Oil Services, Inc., 523 U.S. 75 (1998) to show that evils not specifically contemplated by Congress when it enacted Title VII can still be found discriminatory. Therefore, a transsexual, as a man or woman, may maintain an action for discrimination based on sex.

We modify the conclusions of law accordingly.

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 modification is 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 we are substituting are as or more reasonable than the conclusions of law which have been rejected. See, Section 120.57(1)(l), Florida Statutes (2001).

We adopt the Administrative Law Judge's conclusions of law as modified.

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in an eleven page document entitled, "Petitioner's Exceptions to Recommended Order of Dismissal." Exceptions one through three dealt with the claim for discrimination based on disability and are stricken. Exceptions four and five relate to the claim for discrimination based on sex and are accepted to the extent they support the conclusions of the Commission that, as a man or woman, transsexuals may maintain an action for sexual discrimination.

Dismissal

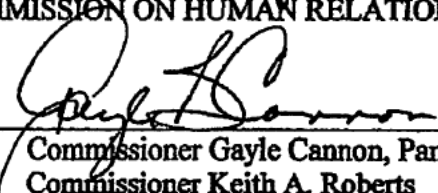
The Request for Relief and Complaint of Discrimination on the basis of disability is DISMISSED with prejudice.

Remand

The Complaint of Discrimination on the basis of sex is hereby reinstated and a finding is made that the Commission has jurisdiction to investigate said complaint consistent this order.

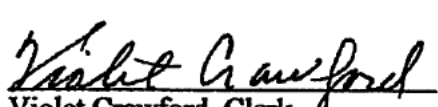
The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this Order is filed with the Clerk of the Commission. Explanation of the right to appeal is found in Section 120.68, Florida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

DONE AND ORDERED this 20th day of August, 2004.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS



Commissioner Gayle Cannon, Panel Chairperson
Commissioner Keith A. Roberts
Commissioner Aletta Shutes

Filed this 25th day of August, 2004
in Tallahassee, Florida.



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Honorable Daniel M. Kilbride, Administrative Law Judge (DOAH)

Jim Tait, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 20th day of August, 2004.

BY: Kristi Crawford
Clerk of the Commission
Florida Commission on Human Relations

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