

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

JACKIE HALL,)
)
 Petitioner,)
)
 vs.) CASE NO. 94-6976
)
 BOEING AEROSPACE OPERATION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER OF DISMISSAL

Pursuant to notice, the above-styled matter was heard before the Division of Administrative Hearings by its duly designated Hearing Officer, Daniel M. Kilbride, on March 21, 1995 in Orlando, Florida. The following appearances were entered:

APPEARANCES

For Petitioner: George T. Paulk, Esquire
1400 Palm Bay Road Northeast
Palm Bay, Florida 32905

For Respondent: James Blue, Esquire
Kevin O'Toole, Esquire
Hogg, Allen, Norton & Blue, P.A.
324 S. Hyde Park Avenue, Suite 350
Tampa, Florida 33601

STATEMENT OF THE ISSUES

Whether the Petition for Relief from an unlawful employment practice was timely filed with the Florida Commission on Human Relations.

Whether the Division of Administrative Hearings has jurisdiction to conduct a formal hearing under the provisions of Section 120.57(1), Florida Statutes, if the Petition was not timely filed.

PRELIMINARY STATEMENT

On November 2, 1993, Petitioner filed a complaint with the Florida Commission on Human Relations (FCHR) charging Respondent with committing an unlawful employment practice. The Commission conducted an investigation and issued a No Cause determination. The parties were notified of the Commission's action by letter, dated October 21, 1994. A Petition for Relief was filed with FCHR on November 29, 1994. On December 15, 1994, the FCHR issued a Transmittal of Petition and transmitted to the Division of Administrative Hearings the Petition for Relief, together with all other "pleadings and jurisdictional papers heretofore filed in this proceeding". This matter was assigned to the undersigned Hearing Officer. In pleadings dated January 16, 1995, Respondent

filed an Answer to the Petition for Relief and filed a Motion to Dismiss. A hearing was set on the threshold issue of timeliness and jurisdiction. On March 21, 1995 this matter was heard on the threshold issues.

At the hearing, Petitioner was present and requested that she be represented by George T. Paulk, Esquire, a member of the Florida Bar. The parties stipulated to certain facts and the Hearing Officer took official notice of the pleadings and jurisdictional papers transmitted to the Division of Administrative Hearings. Mr. Paulk testified on behalf of Petitioner and offered no exhibits in evidence. Respondent did not call any witnesses to testify or offer any exhibits in evidence. The hearing was recorded, but a transcript was not prepared. Petitioner and Respondent filed legal memoranda on March 24, 1995.

Based upon all of the evidence, the following findings of fact are determined:

FINDINGS OF FACT

1. On December 15, 1994, the Florida Commission on Human Relations (FCHR) transmitted to the Division of Administrative Hearings (DOAH) a Petition for Relief from an Unlawful Employment Practice, together with all other "pleadings and jurisdictional papers heretofore filed in this proceeding."

2. The pleadings and papers transmitted by FCHR show that Petitioner filed a Charge of Discrimination with FCHR on November 2, 1993, charging an unlawful employment practice by Respondent in connection with her lay off on October 29, 1992.

3. On October 21, 1994, the FCHR concluded its investigation into the matter and issued its determination of No Cause to believe that an unlawful employment practice has occurred.

4. Notice of that determination was mailed to Petitioner and Respondent on October 21, 1994 by regular mail.

5. The Notice of Determination of No Cause served on Petitioner included the following statement:

Complainant may request an administrative hearing by filing a PETITION FOR RELIEF within 35 days of the date of this NOTICE OF DETERMINATION: NO CAUSE.

A Petition for Relief form is enclosed with Complainant's notice. It may be beneficial to seek legal counsel prior to filing the petition.

If the Complainant fails to request an administrative hearing within 35 days of the date of this notice, the administrative claim under the Florida Civil Rights Act of 1992, Chapter 760, will be dismissed pursuant to Section 760.11, Florida Statutes (1992).

6. Counsel for Petitioner, George T. Paulk II, received the Notice of Determination on behalf of Petitioner and prepared the petition to be "filed" with the FCHR.

7. On November 25, 1994, 35 days after the Notice was mailed, Counsel for Petitioner transmitted to the FCHR her Petition for Relief, requesting an administrative hearing. The petition was submitted on the form provided by the FCHR. The petition was sent by regular U.S. Mail.

8. The Petition for Relief was filed with the FCHR on November 29, 1994, 39 days after the Notice of Determination was issued.

9. The FCHR transmitted the pleadings to the Division of Administrative Hearings for further proceedings.

10. At the same time of the transmittal to Division of Administrative Hearings, FCHR issued a notice of the petition to Respondent advising it of the requirement to file an answer to the Petition for Relief.

11. Respondent timely filed its answer with affirmative defenses, including the first affirmative defense that "Petitioner failed to file her petition within the time allowed by law." Respondent also filed a separate Notice to Dismiss raising the same issue.

12. The Petition for Relief was deposited in the mail on Friday, November 25, 1994, the day after Thanksgiving which is an official state holiday. The next business day was Monday, November 28, 1994.

CONCLUSIONS OF LAW

13. The Division of Administrative Hearings has jurisdiction over the subject matter of this proceeding, and the parties thereto, pursuant to subsection 120.57(1) and 760.11(7), Florida Statutes.

14. The threshold issue in this matter is whether the Division of Administrative Hearings has jurisdiction to proceed to the merits of this matter, or whether the proceeding must be dismissed based on the untimeliness of the Petition for Relief and therefore the claim is barred.

15. Section 760.11, Florida Statutes (1993), which was created in 1992 when the Legislature made significant revisions to Chapter 760, Florida Statutes, addresses the administrative and civil remedies that can be invoked by Petitioner based on an assertion of an unlawful employment practice. The first step is the filing of a complaint with the FCHR, which investigates the complaint and renders an initial determination. This procedure was followed in this case, and the FCHR issued its determination of No Cause on August 24, 1993.

16. Under the Florida Civil Rights Act of 1992, the Division of Administrative Hearings is charged with the responsibility to conduct a formal hearing when the FCHR has issued a No Cause determination and the request for a hearing has been timely filed. Section 760.11(7), Florida Statutes. Subsection (7) describes the administrative remedy available after a no-cause determination, in pertinent part, as follows:

The aggrieved person may request an administrative hearing under s. 120.57, but any such request must be made within 35 days of the date of determination

of [no] reasonable cause . . . If the aggrieved person does not request an administrative hearing within the 35 days, the claim will be barred.

Section 760.11(7), Florida Statutes.

17. The FCHR's rules, which were adopted prior to the 1992 revision of Chapter 760, similarly require a timely request for an administrative hearing. The rules provide for the filing of a petition within 30 days of service of a notice of determination of no cause, with 5 days time added for service by mail. Rules 60Y-5.004(5), 60Y-5.008, and 60Y-4.007, Florida Administrative Code.

18. By rule, FCHR has made it clear that the requirement for "filing" of a document as used in its rules is a requirement for "actual receipt of the document by the Clerk of the Commission at its office." Rule 60Y-4.004(1), Florida Administrative Code reads as follows: "Filing or file with the Commission, means actual receipt of a document by the Clerk of the Commission at its office . . ."

19. The only exception in the FCHR rules that would allow a late-filed petition is as follows:

For good cause shown, the Chairperson may grant an extension of time to file the Petition for Relief from an Unlawful Employment Practice, provided the motion for extension of time is filed within the 30-day period prescribed by Rule 60Y-5.008(1).

Rule 60Y-5.008(2), Florida Administrative Code. Petitioner did not seek relief from the filing deadline under this extension provision.

20. Section 760.11(7), Florida Statutes, requires the timely submission of a request for an administrative hearing, or else the claim is "barred". The Petition for Relief was not timely filed, hence the Petitioner's claim must be deemed barred.

21. Petitioner has failed to establish excusable neglect, which might, under certain circumstances, excuse a delinquent filing. See, e.g., *Machules v. Department of Administration*, 523 So.2d 1132 (Fla. 1988). 1/

22. In *Machules*, the Florida Supreme Court described the parameters of the "equitable tolling" doctrine as follows:

Generally, the tolling doctrine has been applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum. 523 So.2d at 1134.

23. It is undisputed that the petition actually received by the FCHR, and thus filed within the meaning of its rules, was on November 29, 1994, one day past the statutory deadline.

24. The only reason offered by Petitioner for her untimely-filed petition was the testimony of her counsel that he mailed the petition on November 25,

1994 and he was under the mistaken belief that depositing the Petition with the U.S. Mail was sufficient to meet the filing requirements of the FCHR, or, in the alternative, that Petitioner was entitled to 35 days plus an additional five days for mailing.

25. Petitioner did not claim that she was lulled into inaction by anything said or done by the FCHR or by the Respondent, or that she was misled in any fashion. The testimony was that her counsel suffered from misapprehension with respect to his obligations under the FCHR rules for filing the petition. There was no confusion regarding how to fill out the form, or regarding where it was to be filed.

26. In this case, the Petitioner did not timely assert her rights. She was not misled or lulled into inaction, or otherwise prevented from asserting her rights. Instead, the evidence shows that the Petitioner understood her obligation to file a petition on time, and had no excuse for failing to do so. *Environmental Resource Associates of Florida, Inc. v. Department of General Services*, 624 So.2d 330 (Fla. 1st DCA 1993); *Wright v. HCA Central Florida Regional Hospital*, DOAH Case No. 94-0070 Recommended Order, dated July 27, 1994, FCHR Case No. 93-3143 Final Order, dated January 26, 1995.

RECOMMENDATION

Based on the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that a Final Order be entered dismissing with prejudice the Petition for Relief in Division of Administrative Hearings' Case No. 94-6976 and FCHR Case No. 94-7490, for failure to timely file the Petition.

DONE AND ENTERED this 29th day of March, 1995, in Tallahassee, Florida.

DANIEL M. KILBRIDE
Hearing Officer
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-1550
(904) 488-9675

Filed with the Clerk of the
Division of Administrative Hearings
this 29th day of March, 1995.

ENDNOTE

1/ The Machules tolling doctrine may be inapplicable in any event, because its application is dependent on a threshold finding that the statutory period for administrative petitions is not jurisdictional in the sense that failure to comply is an absolute bar to further proceedings but instead is subject to equitable considerations such as tolling. *Machules*, 523 S.O.2d at 1133, n. 2. Here, there is a statute expressly providing that failure to timely request an administrative hearing does indeed result in the claim being "barred." Section 760.11(7), Florida Statutes.

COPIES FURNISHED:

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NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit to the agency written exceptions to this Recommended Order. All agencies allow each party at least ten days in which to submit written exceptions. Some agencies allow a larger period within which to submit written exceptions. You should contact the agency that will issue the Final Order in this case concerning agency rules on the deadline for filing exceptions to this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the Final Order in this case.