

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

LINDA SCHWARTZ,)
)
 Petitioner,)
)
 vs.) Case No. 99-4043
)
 GUY M. TUNNELL, BAY COUNTY)
 SHERIFF'S OFFICE,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

This cause came on for consideration pursuant to the terms of the Order entered herein on December 22, 1999.

APPEARANCES

For Petitioner: Linda G. Milkowitz, Esquire
2731 Blair Stone Lane
Post Office Box 14922
Tallahassee, Florida 32317-4922

For Respondent: R. W. Evans, Esquire
Powers, Quaschnick, Tischler & Evans
1669 Mahan Center Boulevard
Tallahassee, Florida 32308

STATEMENT OF THE ISSUE

Due to the pre-trial motion(s), the present issue is whether or not the Division of Administrative Hearings has jurisdiction of this cause.

PRELIMINARY STATEMENT

The Petition for Relief from an unlawful employment practice was received by the Division of Administrative Hearings on or about September 30, 1999.

On October 13, 1999, Respondent filed his Answer and Affirmative Defenses. Simultaneously therewith, Respondent filed his Motion to Dismiss. An unopposed Amended Answer and Affirmative Defenses and a Supplemental Motion to Dismiss, followed. No response to the Motion was filed.

On December 20, 1999, the undersigned initiated a telephonic conference call which resulted in a December 22, 1999, Order. That Order deemed the Amended Answer and Affirmative Defenses and Supplemental Motion to Dismiss duly filed and provided for Petitioner to file her written response to the Motion on or before January 3, 2000. No timely response by Petitioner was filed. Respondent moved to strike Petitioner's untimely response. In an abundance of caution, Respondent's Motion to Strike is here denied, and Petitioner's late-filed response has been considered. However, over Petitioner's objection, no oral argument has been scheduled.

FINDINGS OF FACT

1. This cause was initiated by Petitioner's complaint of "age" and "sex" discrimination filed with the Florida Commission on Human Relations on or about May 22, 1996.

2. Petitioner (then-complainant) was a female corporal in the bailiff's unit of the Bay County Sheriff's Office. She complained of a hostile work environment.

3. On July 28, 1999, the Florida Commission on Human Relations, by its Executive Director, entered a "Determination: No Cause" Order. Therein, the Commission found:

Respondent is an employer within the meaning of the Florida Civil Rights Act of 1992, and the timeliness and all jurisdictional requirements have been met.

Pursuant to Rule 60Y-5.004(1), Florida Administrative Code, an Investigatory Report has been submitted by the office of Employment Investigations.

On the basis of the report and recommendation, pursuant to the authority delegated to me by Rules 60Y-2.004(2)(e) and 60Y-5.004, Florida Administrative Code, it is my determination that there is no reasonable cause to believe that an unlawful practice has occurred.

4. Thereafter, Petitioner's "Petition for Relief" was filed with the Commission. The date of filing is not apparent from the materials provided to the Division, so it is not possible to determine therefrom if the Petition for Relief was timely filed within 35 days of July 28, 1999, as required by law. However, the Commission did not give notice of the Petition to Respondent nor transmit it to the Division until September 24, 1999.

5. Petitioner's Petition for Relief alleges discrimination against Petitioner on the basis of "gender" (female), "age," and "retaliation" on the basis of a hostile work environment. On the

face of the Petition, it is not possible to determine if the added claim of retaliation is based upon an internal grievance, a prior complaint pursuant to Chapter 760, Florida Statutes, or the discrimination complaint before the Commission which gave rise to the instant Petition for Relief before the Division.

CONCLUSIONS OF LAW

6. The Division of Administrative Hearings has de novo jurisdiction to determine the issues before it pursuant to Chapters 120 and 760, Florida Statutes.

7. The Division is not bound by the July 28, 1999, determinations of the Florida Commission on Human Relations which arrive at the Division solely in the posture of "proposed final agency action."

8. Respondent asserts two legal theories why the Florida Commission on Human Relations, and derivatively, the Division, has no jurisdiction.

9. Respondent's first theory of law is based on there allegedly being "no specific waiver of sovereign immunity for purposes of the Florida Civil Rights Act of 1992 (Florida Statutes Chapter 760 et seq.)" as discussed in Alden v. Maine, 119 S.Ct. 2240 (1999); Hill v. Department of Corrections, 513 So. 2d 129 (1987); Gamble v. Florida Department of Health and Rehabilitation Services, 779 F.2d 1509 (11th Cir. 1986) Beard v. Hambrick, 398 So. 2d 708, Jackson v. Palm Beach County, 360 So. 2d 1 (Fla. 4th DCA 1978), and the unpublished decision of Second

Circuit Judge L. Ralph Smith, Jr. dated October 8, 1999, in Hylton v. State of Florida Department of Revenue.

10. Respondent's second legal theory is couched in terms of the Petition's allegedly failing to state a valid claim for relief. However, Respondent further argues lack of jurisdiction based upon Petitioner's not constituting an "employee" under Chapter 760, Florida Statutes.

11. Respondent's first theory, the alleged absence of a clear waiver of sovereign immunity for proceedings under Chapter 760, Florida Statutes, is rejected.

12. Every published case cited by Respondent in support of this premise involves a federal or state statute other than Chapter 760, Florida Statutes, and requires that there be a clear and specific waiver of sovereign immunity in order for a complainant to proceed.

13. Contrary to the holding in the unpublished case dealing with Chapter 760, Florida Statutes, it is here concluded that Chapter 760, Florida Statutes has, indeed, accomplished a clear waiver of sovereign immunity, because Section 760.01, Florida Statutes, provides in pertinent part,

(6) "Person" includes 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; the state; or any governmental entity or agency.

(7) "Employer" means any person employing 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such a person.

(10) "Aggrieved person" means any person who files a complaint with the Florida Commission on Human Relations. (Emphasis supplied)

14. However, Respondent's second theory, based on lack of jurisdiction of "appointees" is persuasive.

15. The Florida Supreme Court has held that a deputy sheriff (i.e. Petitioner herein) holds office by "appointment" rather than employment, and, that therefore, a deputy sheriff is not a "public employee" within the meaning of Chapter 447, Florida Statutes, a labor relations statute. Murphy v. Mack, 358 So. 2d 822, 826 (Fla. 1978). In support of its holding, the Florida Supreme Court stated, "Since deputy sheriffs have not been identified as employees by the courts of this state, we cannot assume that the Legislature intended to include them in the definition of public employee without express language to this effect. In the absence of language including deputy sheriffs within the definition set forth in Chapter 447, Florida Statutes (1975), we find they are not encompassed by the act."

16. Even though the Mack case involved a statute (Chapter 447) and a term ("public employee") different from Chapter 760, Florida Statutes, and the term "employee" therein, the concept accepted by the Court in Mack, that Sheriffs appoint, rather than

employ, their deputies, stretches back to the common law. Since a sheriff constitutes a constitutional officer, his deputy, who is, in effect, the sheriff's alter ego cannot be an "employee," subject to Chapter 760, Florida Statutes.

17. Moreover, in King v. Thomas, FCHR No. 93-6564 (undated) the Florida Commission on Human Relations, relying on Federation of Public Employees, District No. 1, Pacific Coast District, M.E.B.A., AFL-CIO v. Public Employees Relations Commission, 478 So. 2d 117 (Fla. 4th DCA 1985), which also cited Mack, supra., entered a "Determination: No Jurisdiction" Order, holding that the Commission does not have jurisdiction to hear complaints by deputy clerks of discriminatory treatment and retaliation in violation of the Florida Civil Rights Act (Chapter 760, Florida Statutes), and in Voth v. St. Lucie County Sheriff's Office, FCHR No. 92-2156 (August 5, 1992), the Commission similarly excluded a deputy sheriff, stating, "The complaint fails to state a claim under the Human Rights Act of 1977 or the Respondent is not an employer as defined by the Human Rights Act. Section 760.03, Florida Statutes (1991)."

18. The Legislature has delegated the enforcement of the Florida Civil Rights Act to the Commission. Section 760.03, Florida Statutes. The Commission is empowered to receive, initiate, investigate, mediate, and act upon complaints alleging discriminatory practices defined by the Florida Civil Rights Act. Section 760.06(5), Florida Statutes. Because the Commission is

the administrative agency in charge of interpreting Chapter 760, its interpretation is entitled to great weight.

19. The Commission has accepted, by its case law, the exclusion of deputized officers as "appointees," not "employees," even though Section 760.01(6), Florida Statutes, has consistently, since its inception in 1967, provided that the state and any governmental entity or agency thereof constitute an "employer."

20. The Commission's construction should not be disregarded or overturned except for the most cogent reasons unless clearly erroneous. Department of Health and Rehabilitation Services v. A.S., 648 So. 2d 128, 132 (Fla. 1995); Fortune Insurance Co. v. Department of Insurance, 664 So. 2d 312, 314 (Fla. 1st DCA 1995).

RECOMMENDATION

Upon the foregoing findings of fact and conclusions of law, it is

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition for Relief herein for lack of jurisdiction.

DONE AND ENTERED this 27th day of January, 2000, in
Tallahassee, Leon County, Florida.

ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 27th day of January, 2000.

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.