

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

FILED

01 MAY 29 AM 8:45

MICHELLE C. PHILLIPS,

Petitioner,

v.

ORANGE LAKE COUNTRY CLUB
REALTY, INC.,

Respondent.

EEOC Case No. 11-171

FCHR Case No. 98-0713

DOAH Case No. 00-1794

FCHR Order No. 01-026

DIVISION OF
ADMINISTRATIVE
HEARINGS

DMK
Closed

ORDER REMANDING PETITION FOR
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE

Preliminary Matters

Petitioner Michelle C. Phillips filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (1995), alleging that Respondent Orange Lake Country Club Realty, Inc., committed an unlawful employment practice on the basis of Petitioner's handicap (Hepatitis C and rheumatoid arthritis) when it denied Petitioner reasonable accommodation and terminated Petitioner from her position.

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

Prior to the conduct of a formal proceeding, Administrative Law Judge Daniel M. Kilbride issued a Recommended Order of Dismissal, dated July 10, 2000.

Pursuant to notice, public deliberations were held on April 19, 2001, 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, 325 John Knox Road, Building F, Suite 240, Tallahassee, Florida, 32303-4149. At these deliberations, the Commission panel determined the action to be taken on the Petition for Relief.

Conclusions of Law

The Administrative Law Judge found that upon completion of its investigation of this matter, the Commission issued its "Notice of Determination: No Cause" and mailed a copy to Petitioner on January 31, 2000. Recommended Order of Dismissal, page 2.

The Administrative Law Judge found that a copy of the "Notice of Determination: No Cause" was not served on Petitioner's counsel of record, and that Petitioner filed a Petition for Relief on March 15, 2000. Id.

The Administrative Law Judge concluded that the Petition for Relief was not filed within 35 days of the issuance of the "Notice of Determination: No Cause," and was therefore time-barred by the Florida Civil Rights Act of 1992. Recommended Order of Dismissal, page 3.

The Administrative Law Judge also specifically concluded, "It is undisputed that the FCHR served the Notice of Determination directly to the Petitioner and not counsel of record. This procedure is correct under the provisions of Rule 60Y-5.004(3), Florida Administrative Code." Id.

We conclude that the Administrative Law Judge committed an error of law in concluding that the service of the Notice of Determination on Petitioner, individually, and not on her counsel of record complied with the Commission's rules.

The Florida Civil Rights Act of 1992 states in relevant part with regard to cases, such as the instant case, in which it has been determined there is no reasonable cause to believe that an unlawful employment practice has occurred, "The aggrieved person may request an administrative hearing..., but any such request must be made within 35 days of the date of determination of 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 (1999).

The Administrative Law Judge found that the Notice of Determination was issued on January 31, 2000, the Petitioner had until March 6, 2000 to file her Petition for Relief, and the Petition for Relief was not filed until March 15, 2000. Recommended Order of Dismissal, pages 2 and 3.

Petitioner, through counsel, argues, "The undersigned counsel was unaware of the determination issuance and had the undersigned counsel been aware of the determination he would have been in a position to submit a timely petition for relief. The undersigned counsel was not aware of the issuance of the determination letter until after he had seen a copy of the Petition for Relief from his client, Michelle C. Phillips [on] or about March 15, 2000....The failure to serve the Complainant's counsel of record who was participating throughout the proceedings after the initial complaint being filed is not effective service. Therefore, since counsel was not aware of the determination until on or about March 15, 2000 the 35 days should begin to run from that date. The Petitioner has timely filed the Petition for Relief and the Motion to Dismiss must be denied." "Petitioner's Response in Opposition to Motion to Dismiss Petition for Relief," incorporated by reference into Petitioner's "Exceptions to Recommended Order of Dismissal."

As indicated, supra, the Administrative Law Judge concluded that while it was undisputed that Petitioner's counsel of record was not served with the "Notice of Determination: No Cause," the procedure utilized was "correct under Rule 60Y-5.004(3), Florida Administrative Code." Recommended Order of Dismissal, page 3.

The rule referenced by the Administrative Law Judge states, "After a determination has been made by the Executive Director, the Clerk shall serve a Notice of Determination, with

copies of the determination, upon the complainant and the respondent." Fla. Admin. Code R. 60Y-5.004(3).

The Commission's rules also state, "Any party shall have the right to appear in person, by counsel, or by other authorized representative." Fla. Admin. Code R. 60Y-4.008(1).

Further, the Commission's rules state, "An attorney or authorized representative for any party to a proceeding who has filed an initial or pleading notice of appearance for that party shall remain the attorney or authorized representative of record and shall receive pleadings until notice of withdrawal of authorization is filed with the Commission by the represented party or a motion to withdraw has been served on the represented party and approved by the Commission or hearing officer." Fla. Admin. Code R. 60Y-4.008(2).

In our view, the Commission's rules which affirm the right of Complainants/Petitioners to be represented by counsel (particularly Fla. Admin. Code R. 60Y-4.008(1), supra), support the position that in this case an error of law occurred when the Administrative Law Judge concluded that service on Petitioner, but not Petitioner's counsel of record, complied with the Commission's rules, and supports the position put forward by Petitioner that, therefore, the Petition for Relief was timely filed.

We so conclude, and determine that this case should be remanded to the Administrative Law Judge for further proceedings on the Petition for Relief.

Finally, in reaching the conclusion that the Administrative Law Judge committed an error of law in this matter, we find: (1) that the Administrative Law Judge's conclusion of law being corrected is within the substantive jurisdiction of the Florida Commission on Human Relations, namely the interpretation of what constitutes effective service under the administrative rules promulgated by the Commission; (2) the reason the correction is being made is that the conclusion of law as stated by the Administrative Law Judge frustrates the right to be represented by counsel as set out in the Commission's administrative rules; and (3) that, in making this correction, the conclusion of law being substituted is as or more reasonable than the conclusion being rejected. See, Section 120.57(1)(1), Florida Statutes (1999).

Exceptions

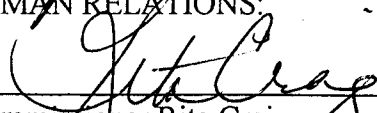
Petitioner excepted to the Administrative Law Judge's Recommended Order of Dismissal in a document entitled "Exceptions to Recommended Order of Dismissal." The argument of Petitioner in this document is set out in the Conclusions of Law section of this Order, supra.

For reasons set out in the Conclusions of Law section of this Order, supra, we accept Petitioner's exceptions to the Recommended Order of Dismissal.

Remand

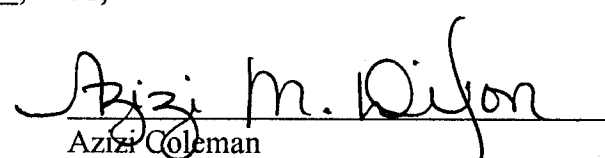
The Petition for Relief from an Unlawful Employment Practice and Complaint of Discrimination are hereby REMANDED to the Administrative Law Judge for further proceedings consistent with this Order.

DONE AND ORDERED this 19 day of April, 2001.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:



Commissioner Rita Craig,
Panel Chairperson;
Commissioner George Farrell, and
Commissioner Roosevelt Paige

Filed this 23 day of May, 2001,
in Tallahassee, Florida.



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