

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

UNITED SERVICES AUTOMOBILE)
ASSOCIATION,)
)
Petitioner,)
)
vs.) Case No. 01-0550F
)
ANTHONY CIRRUZZO,)
)
Respondent.)
_____)

RECOMMENDED ORDER

Pursuant to notice, a formal hearing was conducted in this case on April 5, 2001, in Tampa, Florida, before Lawrence P. Stevenson, a duly-designated Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: John W. Campbell, Esquire
Constangy, Brooks & Smith, LLC
Post Office Box 1840
Tampa, Florida 33601-1840

For Respondent: Anthony Cirruzzo, pro se
7692 Deer Foot Drive
New Port Richey, Florida 34653

STATEMENT OF THE ISSUE

The issue presented for decision in this case is whether Petitioner is entitled to costs as a prevailing party pursuant to Section 760.11, Florida Statutes.

PRELIMINARY STATEMENT

This matter was opened by the Division of Administrative Hearings ("DOAH") pursuant to a Motion to Tax Costs (the "Motion") filed by Petitioner, United Services Automobile Association ("USAA"), on February 5, 2001, in the case of Cirruzzo v. United Services Automobile Association, DOAH Case No. 00-2929. By order dated January 9, 2001, DOAH Case No. 00-2929 was closed, pursuant to Mr. Cirruzzo's notice of voluntary dismissal filed on January 5, 2001. The Motion requests costs in the amount of \$1,707.50, including fees for service of summons to witnesses, court reporter fees for witness depositions, and witness fees. The matter was set for hearing on April 5, 2001.

At the formal hearing, USAA presented no sworn testimony. USAA's Exhibits 1 through 3, documenting the costs for which payment is sought, were admitted into evidence. USAA also filed the depositions of Anthony Cirruzzo and John Luke Carscallen, taken in DOAH Case No. 00-2929, as well as Mr. Cirruzzo's answers to interrogatories in that case, all of which were considered by the undersigned without objection.

Mr. Cirruzzo testified on his own behalf. He offered no exhibits at the hearing. His post-hearing submission contained Attachments A through G, to which no objection was offered by USAA and which were therefore considered by the undersigned.

No transcript was provided. Both parties timely filed proposed recommended orders.

FINDINGS OF FACT

Based on the oral and documentary evidence adduced at the final hearing, and the entire record in this proceeding, the following findings of fact are made:

1. On July 17, 2000, the Florida Commission on Human Relations forwarded to DOAH a request for formal administrative hearing filed by Anthony Cirruzzo, alleging that USAA, his employer, had discriminated against him because of his age. DOAH Case No. 00-2929 was opened and consolidated with two related age discrimination proceedings, Knopfel v. United Services Automobile Association, DOAH Case No. 00-2314, and Henry v. United Services Automobile Association, DOAH Case No. 00-2931. Mr. Cirruzzo was also one of the plaintiffs in a lawsuit filed in the United States District Court, Middle District of Florida, on July 25, 2000, claiming age discrimination against USAA.

2. On June 21, 2000, USAA filed an answer and affirmative defenses to the petition in DOAH Case No. 00-2929. In its answer, USAA requested a judgment awarding it attorneys' fees and costs pursuant to Florida law.

3. On November 15, 2000, counsel for Mr. Cirruzzo filed a motion for leave to withdraw as counsel. On November 30, 2000, USAA filed a motion to sever and administratively

dismiss the petitions of Knopfel and Henry, pursuant to a settlement reached between USAA and those persons. By order dated December 7, 2000, the motion to sever and dismiss was granted. By order dated December 8, 2000, the motion to withdraw as counsel was granted.

4. Also on December 8, 2000, the undersigned entered an order requiring Mr. Cirruzzo to notify this tribunal of his intent to proceed in the matter, either on his own behalf or represented by new counsel. On December 15, Mr. Cirruzzo filed a response stating his intent to proceed in the matter pro se. By Order dated December 28, 2000, the case was set for hearing on January 31 through February 3, 2001, in Tampa, Florida.

5. On January 5, 2001, Mr. Cirruzzo filed a notice of voluntary dismissal of DOAH Case No. 00-2929. By order dated January 9, 2001, the file in DOAH Case No. 00-2929 was closed.

6. USAA seeks costs in the amount of \$1,410.00 for the transcription of the deposition of Mr. Cirruzzo taken on October 3, 2000, and the deposition of his supervisor at USAA, John Luke Carscallen, taken on October 5, 2000.

7. The transcript of Mr. Cirruzzo's partial deposition is 137 pages long. During the deposition, counsel for USAA questioned Mr. Cirruzzo regarding his age discrimination claim, but also as to whether Mr. Cirruzzo was discriminated against because of his gender and national origin, matters not

alleged in DOAH Case No. 00-2929. Gender and national origin discrimination were alleged by Mr. Cirruzzo in a later filed complaint filed with the Florida Commission on Human Relations, and in a federal lawsuit filed in December 2000.

8. Mr. Carscallen's deposition contains questions as to gender and national origin discrimination, as well as the age discrimination at issue in DOAH Case No. 00-2929.

9. At the hearing, Mr. Cirruzzo argued that the costs for these depositions should not be fully taxed in this proceeding because large portions of them dealt with issues relevant only to his federal gender and national origin discrimination case.

10. On or about February 8, 2001, USAA filed in the federal court a request for a shortened discovery period in the federal lawsuit. The request states that DOAH Case No. 00-2929 was "nearly identical" to the federal case, that the parties had already engaged in extensive discovery of the issues in the DOAH case, and that repeating that discovery in the federal case would be a waste of time, money and judicial resources. The record does not indicate whether or how the federal court ruled on this request.

11. Thus, USAA does not dispute that the depositions will be useful in other phases of its litigation against Mr. Cirruzzo. Nonetheless, the depositions were taken in DOAH Case No. 00-2929. As the defendant in multiple cases, USAA

acted reasonably and efficiently by covering in a single deposition all the issues raised by Mr. Cirruzzo. It would be unreasonable to expect USAA to separate the motives for the discrimination from the common set of facts and persons involved in Mr. Cirruzzo's allegations regarding his employment at USAA, and to take a separate deposition for each alleged motive. The costs for the depositions are properly a part of this case.

12. USAA seeks an award of costs in the amount of \$260.00 for service of summons and subpoenas, and \$37.50 in witness fees in DOAH Case No. 00-2929. These costs were documented, reasonable, and all related to obtaining documents and records related to Mr. Cirruzzo's claims, or to securing the presence of witnesses identified by Mr. Cirruzzo as possessing relevant information. These costs are properly part of this case.

13. Mr. Cirruzzo testified that his voluntary dismissal of DOAH Case No. 00-2929 was premised on his understanding that USAA had agreed that it would absorb its own costs if the case were dismissed. As evidence therefor, Mr. Cirruzzo offered a "Confidential Settlement Agreement and Release of All Claims" drafted by counsel for USAA, in which USAA offered to pay a portion of Mr. Cirruzzo's legal fees and to absorb its own fees and costs in exchange for Mr. Cirruzzo's dropping all claims and causes of action against USAA relating to his

employment. USAA did not disclaim having made this offer, but rightly pointed out that Mr. Cirruzzo had rejected it. This draft proposal provides no reasonable basis for Mr. Cirruzzo's claim of an agreement with USAA that the company would absorb its costs.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this proceeding pursuant to Subsection 120.57(1), Florida Statutes.

15. This proceeding is governed by Section 760.11, Florida Statutes, subsection (6) of which provides:

(6) Any administrative hearing brought pursuant to paragraph (4)(b) [providing for an administrative hearing] shall be conducted under ss. 120.569 and 120.57. The commission may hear the case provided that the final order is issued by members of the commission who did not conduct the hearing or the commission may request that it be heard by an administrative law judge pursuant to s. 120.569(2)(a). If the commission elects to hear the case, it may be heard by a commissioner. If the commissioner, after the hearing, finds that a violation of the Florida Civil Rights Act of 1992 has occurred, the commissioner shall issue an appropriate proposed order in accordance with chapter 120 prohibiting the practice and providing affirmative relief from the effects of the practice, including back pay. If the administrative law judge, after the hearing, finds that a violation of the Florida Civil Rights Act of 1992 has occurred, the administrative law judge shall issue an appropriate recommended order in accordance with chapter 120 prohibiting the practice and providing affirmative relief from the

effects of the practice, including back pay. Within 90 days of the date the recommended or proposed order is rendered, the commission shall issue a final order by adopting, rejecting, or modifying the recommended order as provided under ss. 120.569 and 120.57. The 90-day period may be extended with the consent of all the parties. An administrative hearing pursuant to paragraph (4)(b) must be requested no later than 35 days after the date of determination of reasonable cause by the commission. In any action or proceeding under this subsection, the commission, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. It is the intent of the Legislature that this provision for attorney's fees be interpreted in a manner consistent with federal case law involving a Title VII action. (Emphasis added)

16. Review of case law in Florida federal courts indicates that USAA is not entitled to an award of costs in this proceeding because it is not a "prevailing party." In Chacon v. Ezekiel, 957 F. Supp. 1265 (S.D. Fla. 1997), the court, relying on Christianburg Garment Co. v. EEOC, 434 U.S. 412 (1978) and Marquart v. Lodge 837, 26 F.3d 842 (8th Cir. 1994), found that a Title VII defendant may be termed a "prevailing party" only where the court determines the plaintiff's claim to be without foundation. 957 F. Supp. At 1267. The court held that in a case in which the pleadings do not clearly reveal that the plaintiff's claim was frivolous or unreasonable, and in which the plaintiff voluntarily dismissed her claim before an adjudication on the merits, there was no

basis to deem the defendant a "prevailing party. Id. Accord DeShiro v. Branch, 183 F.R.D. 281, 285-86 (M.D. Fla. 1998)(There must be a judicial determination on the merits in order for there to be a prevailing party; voluntary dismissal of a Title VII claim means that defendant cannot be deemed a "prevailing party.")

17. The court's holding applies to this proceeding. No showing has been made that Mr. Cirruzzo's claim was without foundation, frivolous, unreasonable, or groundless, and Mr. Cirruzzo voluntarily dismissed his claim prior to a hearing on the merits. USAA has not established its entitlement to costs as a "prevailing party" pursuant to Section 760.11, Florida Statutes.

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 denying USAA's petition for costs incurred in DOAH Case No. 00-2929.

DONE AND ENTERED this 8th day of May, 2001, in
Tallahassee, Leon County, Florida.

LAWRENCE P. STEVENSON
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 8th day of May, 2001.

COPIES FURNISHED:

John W. Campbell, Esquire
Constangy, Brooks & Smith, LLC
Post Office Box, 1840
Tampa, Florida 33601-1840

Anthony Cirruzzo
7692 Deer Foot Drive
New Port Richey, Florida 34653

Azizi M. Coleman, Clerk
Florida Commission on Human Relations
Department of Management Services
325 John Knox Road
Building F, Suite 240
Tallahassee, Florida 32303-4149

Dana A. Baird, General Counsel
Department of Management Services
Florida Commission on Human Relations
325 John Knox Road
Building F, Suite 240
Tallahassee, Florida 32303-4149

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.