

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JERRY ANN WINTERS,	)	
	)	
Petitioner,	)	
	)	
vs.	)	Case No. 01-0786
	)	
BOARD OF REGENTS AND UNIVERSITY	)	
OF SOUTH FLORIDA,	)	
	)	
Respondents.	)	
_____	)	

ORDER REDUCING FEE AWARD PURSUANT TO REMAND

On September 5, 2005, the District Court of Appeal for the Second District, State of Florida (District Court), entered an Order remanding the case to the administrative law judge (ALJ) for additional consideration on the issue of attorney's fees that were previously awarded pursuant to Subsection 120.595(5), Florida Statutes (2003).

On March 3, 2006, the parties requested oral argument on the remand. Prior to the March 3 request, the Division of Administrative Hearings (DOAH) had not received notice that the case had been remanded to the ALJ. Following a telephone conference, the parties agreed to submit written memoranda related to the remand and established a stipulated deadline of June 30, 2006. Although the Respondents' filing did not occur until July 3, 2006, both memoranda were considered in the preparation of this Order, as were the documents attached to the Respondents' filing, including the fee hearing Transcript, a contingency fee agreement between the Petitioner and her legal counsel, and relevant billing records.

During the April 5, 2004, fee hearing before DOAH, counsel for the Petitioner asserted entitlement to an award of fees in the amount of \$205,906 and costs in the amount of \$2,804.97. The Respondents asserted that no fees or costs should be awarded.

In the June 25, 2004, Order on Fees, the ALJ found a total fee award of \$88,000 was appropriate based on a reasonable

hourly rate of \$275 multiplied by 320 hours that were reasonably expended and directly applicable to the case before DOAH. The ALJ additionally awarded costs in the amount of \$307. In the remand order, the District Court affirmed the findings of the ALJ as to "the reasonable number of hours expended and the reasonable hourly rate because they are supported by competent, substantial evidence."

However, the District Court stated as follows:

Here, the ALJ's order awarding fees does not indicate that the ALJ considered the relationship between Winters' successful and unsuccessful claims. The order thus fails to comply with the requirements of Rowe. On appeal from the first agency order, Winters was unsuccessful on her claim that the agency erred in finding her dishonest. Winters prevailed on only one claim—that the agency erred in determining that she was guilty of retaliatory conduct—and the result of her success of that claim was not a reversal of the agency's order of termination but a remand for the agency to reconsider the termination issue. If the result of the litigation was partial or limited success, the lodestar must be reduced to an amount that is not excessive. Because Winters' success on appeal was limited "in comparison to the scope of the litigation as a whole," the ALJ erred in failing to adjust the lodestar amount based on her unsuccessful claim. Accordingly, we reverse and remand for the trial court to either attempt to identify specific hours spent in the unsuccessful claim or to simply reduce the award by some proportion.  
(citations omitted)

Review of the Recommended Order entered in this case on July 2, 2001, indicates that the central issue addressed at the hearing and in the Recommended Order was a factual dispute related to allegations of retaliatory conduct on the part of the Petitioner toward a student basketball player, Melikki Dione Smith (Smith), whom the Petitioner dismissed from the team. As indicated by Findings of Fact numbered 1 through 43 of the Recommended Order, the evidence presented by the Respondents at

the hearing failed to establish such retaliatory conduct by the Petitioner. The Respondents issued a Final Order rejecting these Findings of Fact. The District Court subsequently determined that such rejection was inappropriate and ordered that fees be awarded pursuant to Subsection 120.595(5), Florida Statutes (2003).

A second issue addressed at hearing and in the Recommended Order, Findings of Fact numbered 44 through 51, was whether the Petitioner provided "dishonest" written responses to the University of South Florida (University) investigation of the alleged retaliation.

Finding of Fact 44 states that the University sought responses from the Petitioner to a series of questions set forth in an August 28, 2000, memorandum to the Petitioner from a University official. The memorandum requested that the Petitioner acknowledge that the Petitioner was aware: of a 1999 investigation by the University into "alleged race discrimination"; that the "Complainant" participated in the investigation; that the Complainant was dismissed from the team; and that the Complainant's dismissal was for participating in the investigation. The "Complainant" was Smith.

The Petitioner responded to the question by an affidavit dated November 16, 2000, prepared upon the advice of legal counsel, wherein the Petitioner stated in relevant part that she was unaware that Smith had participated in an investigation. Finding of Fact 48 found that it was reasonable, given the information available to the Petitioner at the time of the affidavit, to infer that the Petitioner was aware that Smith had participated in the investigation.

Finding of Fact 50 found that, prior to submitting her written responses to the memo, the Petitioner verbally acknowledged to a University investigator that the Petitioner was aware that a discrimination complaint had been filed against her, and that there was no evidence that the Petitioner's affidavit was an attempt to mislead University officials.

The University's Final Order determined that the Petitioner's affidavit response was dishonest, and violated provisions of the employment contract between the University and the Petitioner, which included dishonesty as cause for termination of the contract. Eventually, the Petitioner's employment was terminated for cause, and such termination was apparently upheld following a subsequent appeal.

The District Court has directed that the ALJ "either attempt to identify specific hours spent in the unsuccessful claim or to simply reduce the award by some proportion."

It is not possible to attribute specific hours expended on the basis of the issues raised in this case. The Petitioner prevailed on the issue related to whether she retaliated against a player who had filed a complaint of discrimination against her. She did not prevail on the issue of dishonesty and did not prevail in her ultimate goal of being reinstated as coach and receiving back pay.

Accordingly, based on the District Court's Order, the fee award will be reduced "by some proportion."

Subsection 120.595(5), Florida Statutes (2003), provides as follows:

When there is an appeal, the court in its discretion may award reasonable attorney's fees and reasonable costs to the prevailing party if the court finds that the appeal was frivolous, meritless, or an abuse of the appellate process, or that the agency action which precipitated the appeal was a gross abuse of the agency's discretion. Upon review of agency action that precipitates an appeal, if the court finds that the agency improperly rejected or modified findings of fact in a recommended order, the court shall award reasonable attorney's fees and reasonable costs to a prevailing appellant for the administrative proceeding and the appellate proceeding. (emphasis supplied)

The District Court's remand states that "[n]othing in the text of section 120.595(5) supports applying the fee in [a] punitive manner" and rejects the Petitioner's assertion that there should be no reduction in the award of fees based on the results obtained.

In applying the statute under which the fee award is obtained, it is necessary to note that, where an agency improperly modifies or rejects findings of fact in a recommended order, the statute provides for an award of fees for both the appeal to correct the agency's action and for the underlying

administrative proceeding. Had the Legislature sought simply to reimburse a party for the fees and costs incurred in appealing an agency's improper action, the cited statute could have provided only that such fees and costs related to the appellate proceeding would be awarded as it did in the first sentence of the referenced section. While the referenced statute does not prohibit the reduction of the fee award based on the ultimate results obtained, giving effect to the statute requires that award reflect the requirement of the statute.

Accordingly, with due regard to the relationship between the Petitioner's successful and unsuccessful claims, as well as to the statute under which fees are being awarded, the fee award of \$88,000 is reduced by 25 percent to \$66,000.

Additionally, the District Court's order remanding the case to the ALJ stated as follows:

The Board of Regents and USF also argue that the ALJ should have adjusted the lodestar figure based on the partial contingency risk agreement entered into by Winters and her counsel. Winters concedes that the agreement was in existence-and that she and her counsel had been operating under the agreement-at the time of the appeal of the first agency order. On remand, the ALJ shall consider whether the lodestar amount should also be reduced based on the contingency risk factor in the partial contingency fee agreement. (citations omitted)

Upon review of the "Retainer and Fee Agreement" between the Petitioner and her legal counsel, the ALJ finds no cause based on the fee agreement for further reduction in the fee award made herein. Although the agreement provides for an hourly rate of \$110, nothing in the contract indicates that the \$110 rate is "reasonable." The fact that the Petitioner's counsel agreed to the rate does not alter the fact that the hourly rate of \$275 has been found to be reasonable. No further reduction in the lodestar amount other than as set forth herein is warranted.

DONE AND ORDERED this 1st day of August, 2006, in Tallahassee, Leon County, Florida.

*William F. Quattlebaum*

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original Notice of Appeal with the agency clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.



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