

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MARIA OLIVERAS,)
)
 Petitioner,)
)
 vs.) Case No. 01-3928
)
 AERO DECAL,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER OF DISMISSAL

THIS CAUSE came on to be heard by Daniel M. Kilbride, Administrative Law Judge, on the Motion to Dismiss filed October 29, 2001, by Respondent, before the Division of Administrative Hearings, in Tallahassee, Florida. Petitioner was advised of the Motion; the Administrative Law Judge issued an Order to Show Cause, dated October 31, 2001, and Petitioner did not file a response within the required time, pursuant to Rules 28-106.204(1) and (4), Florida Administrative Code. The arguments presented in the Motion have been fully considered. The following appearances were entered:

APPEARANCES

For Petitioner: No appearance

For Respondent: Christopher J. Coleman, Esquire
Schillinger & Coleman, P.A.
1329 Bedford Drive, Suite 1
Melbourne, Florida 32940

STATEMENT OF THE ISSUES

Whether the Division of Administrative Hearings has jurisdiction to conduct a formal hearing under the provisions of Sections 120.569 and 120.57(1), Florida Statutes, if the Petition for Relief does not allege that Respondent is an "employer" under Section 760.02(7), Florida Statutes, and if the Petition for Relief was not timely filed pursuant to Section 760.11(7), Florida Statutes.

PRELIMINARY STATEMENT

On February 22, 2001, Petitioner filed with the Florida Commission on Human Relations (the "Commission") a Charge of Discrimination against Respondent based on her sex and her personal life. The Charge alleged that Respondent had eight employees. The Commission then conducted an investigation. Upon completion of its investigation, the Commission issued its Notice of Determination: No Jurisdiction. The Commission's investigation determined that Respondent did not employ 15 or more employees for each working day over the current year and preceding year. The Commission mailed a copy of its Notice of Determination: No Jurisdiction to Petitioner on August 30, 2001. Petitioner was advised that she must file a Petition for Relief within 35 days of the date of the Notice or her claim would be barred. Section 760.11(7), Florida

Statutes. The 35th day following the date of issuance of the Notice of Determination was October 4, 2001. Petitioner filed her Petition for Relief with the Commission on October 5, 2001. Petitioner requested a formal hearing under the provisions of Section 120.57(1), Florida Statutes. In her Petition, Petitioner acknowledged that Respondent has less than 15 employees on its payroll. The Commission referred this matter to the Division of Administrative Hearings on October 11, 2001, for resolution of the issues. Respondent filed its Answer and Affirmative Defenses to the Petition for Relief on October 24, 2001. Respondent filed its Motion to Dismiss on the same date. On October 31, 2001, an Order to Show Cause was issued directing Petitioner to respond to the Motion to Dismiss within ten days of the date of the Order or the case would be dismissed. The Motion and the Order were sent to Petitioner's last known address. Petitioner has not filed a response to the Motion or to the Order to Show Cause as of the date of this Recommended Order. It is, therefore,

FOUND AND DETERMINED that Petitioner had until October 4, 2001, to file her petition, pursuant to the statute. The Petition was not filed with the Commission until October 5, 2001. Petitioner has not filed a response to the Motion to Dismiss or the Order to Show Cause, and has not shown good cause for her delay in filing the Petition, nor has she

alleged that Respondent was an "employer" within the meaning of Section 760.02(7), Florida Statutes. Therefore, the Petition for Relief is time barred for failure to file the Petition within 35 days of the date of determination of no reasonable cause by the Commission. Section 760.11(7), Florida Statutes (2001); Wright v. HCA Central Florida Regional Hospital, Inc., 18 FALR 1160 (1995), cf. St. Petersburg Motor Club v. Cook, 567 So. 2d 488 (Fla. 2d DCA 1990) and Joshua v. City of Gainesville, 768 So. 2d 432 (Fla. 2000); see Blakely v. United States Automobile Ass'n, 1999 WL 1053122 (M.D. Fla., October 4, 1999); Dawkins v. Bellsouth Telecommunications, Inc., 53 F.Supp.2d 1356, 1360-61 (M.D. Fla. 1999). This procedure has been determined to be constitutional, under Florida law. McElhath v. Burley, 707 So. 2d 836 (Fla. 1st DCA 1998). Further, and equally important, DOAH and the Commission lack jurisdiction over the Petition for Relief and the Charge of Discrimination based on the fact that Respondent is not an "employer" within the meaning of Section 760.02(7), Florida Statutes. Regency Towers Owners Association, Inc. v. Pettigrew, 436 So. 2d 266 (Fla. 1st DCA 1983), rev. den. 444 So. 2d 417 (Fla. 1984).

RECOMMENDATION

Based on the foregoing facts and conclusions of law, it is

RECOMMENDED that a final order be entered dismissing with prejudice the Petition of Maria Oliveras in DOAH Case No. 01-3928; FCHR Case No. 21-01229.

DONE AND ENTERED this 28th day of November, 2001, in Tallahassee, Leon County, Florida.

DANIEL M. KILBRIDE
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 28th day of November, 2001.

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.