

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

LADORIS G. TUTSON, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 01-4316  
 )  
 DEPARTMENT OF CHILDREN AND )  
 FAMILY SERVICES, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER OF DISMISSAL

On February 21, 2002, an Order was entered that reserved ruling on the Respondent's Motion to Dismiss. The Order directed the Petitioner to file an amended petition to fully outline the basis for the claim for relief. Such Amended Petition was filed with the Division of Administrative Hearings on March 11, 2002.

Thereafter, the Respondent filed an Answer, Affirmative Defense, and Motion to Dismiss Amended Petition. Having reviewed the matter fully, and having considered the allegations in a manner most favorable to the Petitioner, for the reasons set forth below, it is concluded that, as a matter of law, the Florida Commission on Human Relations should enter a Final Order dismissing this case.

APPEARANCES

For Petitioner: Randy A. Fleischer, Esquire  
4801 South University Drive  
Suite 3070  
Davie, Florida 33328

For Respondent: Maryellen McDonald, Esquire  
Department of Children and Family Services  
1317 Winewood Boulevard, Building 2  
Tallahassee, Florida 32399-0700

STATEMENT OF THE ISSUE

Whether the Petitioner's Amended Petition should be dismissed.

PRELIMINARY STATEMENT

On November 2, 2001, the Florida Commission on Human Relations (Commission) forwarded a Petition for Relief from the Petitioner, Ladoris Tutson, naming the Respondent, Department of Children and Family Services, as the party that had committed an unlawful employment practice. More specifically, the claim alleged that the Respondent had unlawfully failed to promote the Petitioner due to her race and sought damages in the amount of \$50,000.

The Respondent filed a Motion to Dismiss on January 16, 2002, and a telephone conference call was scheduled to address such motion. The parties were afforded a conference call on January 29, 2002. As a result, an Order was entered on February 21, 2002. The Order directed the Petitioner to file an Amended Petition and provided the Respondent with an opportunity

to respond to the Amended Petition. Both parties timely complied with the Order.

The following facts are undisputed in this cause:

FINDINGS OF FACT

1. From approximately October 15, 1979, through the time of the Amended Petition, the Petitioner has been employed at the South Florida State Hospital (Hospital).

2. Prior to October 31, 1998, the Hospital was operated by the State of Florida through one of its agencies. The Hospital was privatized on or about October 31, 1998, and is no longer managed by the State of Florida.

3. The Amended Petition alleged that:

On June 25, 1997, Gerald Driscoll, a white male with less experience and qualifications than the Petitioner was notified that he had been promoted into the position of Unit Treatment and Rehabilitation Director which Petitioner had applied for, as evidenced by the memorandum notifying Driscoll of the appointment attached as Exhibit B. Subsequently, the Petitioner complained of Violence in the Workplace/Hate Crimes on October 1, 1997, after a wooden cross was placed on her computer. The Petitioner continued to suffer from this glass ceiling which prevented her from being promoted at the S.F.S.H. [Hospital] facility where there are no blacks in supervisory positions.

4. On June 27, 1997, the Petitioner wrote a memorandum to the Commission complaining about the selection of Mr. Driscoll.

The memorandum stated:

A blatant campaign of racism reigns at South Florida State Hospital. Most recently, the hospital advertised for the position of Unit Treatment and Rehabilitation Director. Two (2) positions were to be filled as a result of that advertisement. Qualified applicants were interviewed from within the hospital. There were two (2) Afro-American and three (3) Anglo-Saxon applicants. Of the two (2) Afro-American applicants applying, I met all of the qualifications to fill one (1) of the positions. Over the dissent of others on the interviewing committee, Patricia Espinosa Thomson (acting hospital administrator) re-advertised the position(s).

5. The Memorandum, apparently the Petitioner's second attempt to file a complaint against the Hospital, recognized that the prior complaint had been referred by the Commission to the Miami District EEO Office. The prior investigation of discrimination had, according to the Petitioner, "widened the door to a continuance of racial discrimination in the promotional practices at South Florida State Hospital." The Petitioner alleged that the Miami District EEO Office had found no fault "on the part of South Florida State Hospital and its promotional practices, giving [sic] South Florida State the okay to continue its covert practice of racial discrimination."

6. On September 12, 1997, the Commission acknowledged receipt of the Petitioner's Memorandum of June 27, 1997, and, in accordance with a Worksharing Agreement with the Equal Employment Opportunity Commission (EEOC), the complaint was

forwarded to the Miami District Office of the EEOC. This complaint (the Petitioner's second filing) is the subject matter of the instant case. The Commission's notice to the Petitioner provided:

Within 35 days of notice of EEOC's Letter of Determination regarding the above referenced complaint, you may request the FCHR to review the final finding and orders of the EEOC by requesting a Substantial Weight [sic] Review.

7. There are no allegations in the Amended Petition regarding the Miami District's Letter of Determination or when such decision was reached. It is undisputed, however, that the Commission did not issue its Notice of Determination until October 9, 2001.

8. The Notice of Determination represented that the Respondent was advised of the Petitioner's claim in January of 1998. The Notice of Determination also recognized that the Respondent had asserted that the claim was "time-barred" and that it would not provide information regarding the claim.

9. Based upon the inference found in Rule 60Y-5.003(4), Florida Administrative Code, the Commission entered a determination of cause.

10. The last act of alleged discrimination occurred on June 17, 1997.

11. The Petitioner filed the Petition for Relief seeking an administrative hearing on October 31, 2001.

CONCLUSIONS OF LAW

12. The Division of Administrative Hearings has jurisdiction over the parties to this proceeding. As to the subject matter of these proceedings, as will be explained below, the complaint is barred.

13. Section 760.11, Florida Statutes (1997), provided administrative and civil remedies for alleged violations of chapter 760. Such statute required any person aggrieved by a violation to file a complaint with the Commission within 365 days of the alleged violation. The Petitioner filed the Memorandum complaint within 365 days of the last act of alleged discrimination. Subsection (8) of the law provided:

In the event that the commission fails to conciliate or determine whether there is reasonable cause on any complaint under this section within 180 days of the filing of the complaint, an aggrieved person may proceed under subsection (4), as if the commission determined that there was reasonable cause.

14. Subsection (4) of the law authorized an aggrieved party to pursue the matter administratively or through a civil action. Such subsection provided:

In the event that the commission determines that there is reasonable cause to believe that a discriminatory practice has occurred in violation of the Florida Civil Rights Act of 1992, the aggrieved party may either:

(a) Bring a civil action against the person named in the complaint in any court of competent jurisdiction; or

(b) Request an administrative hearing under ss.120.569 and 120.57.

The election by the aggrieved person of filing a civil action or requesting an administrative hearing under this subsection is the exclusive procedure available to the aggrieved person pursuant to this act.

15. Thus, based upon the law at that time, at the conclusion of the 180 days, the Petitioner was entitled to (a) bring a civil action, or (b) request an administrative hearing. The Petitioner did neither.

16. As a matter of law, when the Commission failed to issue a formal determination within 180 days of the filing of the complaint, the Petitioner was entitled to seek an administrative or civil remedy as an aggrieved party as there was "cause" to pursue the case further. The subsequent entry of a Determination of Cause based upon the inference in Rule 60Y-5.003(4), Florida Administrative Code, does not revive or extend the otherwise stale claim.

17. To complicate the matter further, since the Petitioner failed to pursue the claim at the end of the 180-day period, Hospital administration records may no longer be in the control or custody of the Respondent. It is undisputed that the Hospital was privatized in 1998.

18. In this case, the Commission gave the Petitioner notice of its referral of the case to the Miami District EEOC. It further advised the Petitioner that she could request a review of that investigation within 35 days of its Letter of Determination. No allegation as to when that determination was reached is set forth in the Amended Petition. Instead, the Notice of Determination entered by the Commission (approximately 4 years, 3.5 months after the complaint was filed) based its conclusion of cause on the agency's non-provision of information. The first Petition for Relief filed by the Petitioner clearly was beyond 4 years.

19. In Joshua v. City of Gainesville, 768 So.2d 432 (Fla. 2000), the court held that a civil action on a claim of discrimination was timely filed under Section 95.11, Florida Statutes. The court determined that claimants have 4 years to assert a civil action for damages based upon an allegation of discrimination. Based upon the Joshua rationale, the Petitioner in the instant case is barred from pursuing a civil action in this matter.

20. Similarly, when extended to its next logical step, based upon Joshua, it must further be concluded that the Petitioner may not file an administrative action (the Petition for Relief) outside the 4-year period. A final order providing for damages and attorney's fees is enforced through a civil



court as would be any other judgment. See Section 760.11(10), Florida Statutes. Taken to an illogical conclusion, the Petitioner could file a claim, wait for any undetermined amount of time, obtain a final order (based upon an inference of cause), and attempt civil enforcement of a final order well beyond the statutory limits on actions. Such absurd conclusion would defeat the purpose of having limitations on actions.

21. In this case the Petitioner was given notice of the Commission's ability to review the Miami District Office's EEOC Letter of Determination. The Petitioner was advised to request the review within 35 days. When the Commission did not issue a determination of cause within 180 days of the filing of the complaint, the Petitioner had a statutory right to seek an administrative review or file a civil action. In this case the Petitioner did nothing to advance the case to either venue. Accordingly, jurisdiction over the subject matter of these proceedings is time-barred as a matter of law.

#### RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is RECOMMENDED that the Commission enter a Final Order dismissing this cause.

DONE AND ENTERED this 24th day of June, 2002, in  
Tallahassee, Leon County, Florida.

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J. D. PARRISH  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 24th day of June, 2002.

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.

