

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

JOANNE WHITAKER MCSHANE,                    )  
  )  
                  Petitioner,                    )  
  )  
vs.    )     Case No. 01-4449  
  )  
BREVARD COUNTY SHERIFF'S                    )  
OFFICE,   )  
  )  
                  Respondent.                 )  
\_\_\_\_\_  
  )

RECOMMENDED ORDER

This cause came before Daniel M. Kilbride, Administrative Law Judge, Division of Administrative Hearings, upon the Stipulated Facts, proposed Conclusions of Law and Memoranda of Law submitted by the parties in Tallahassee, Florida.

APPEARANCES

For Petitioner: William R. Amlong, Esquire  
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For Respondent: Keith C. Tischler, Esquire  
Powers, Quaschnick, et. al.  
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STATEMENT OF THE ISSUE

Whether the Florida Commission on Human Relations (FCHR) properly issued a Determination: No Jurisdiction, on October 1, 2001, relating to Petitioner's two-count Charge of Discrimination dated April 30, 1999.

PRELIMINARY STATEMENT

On or about May 4, 1999, Petitioner filed a Charge of Discrimination with FCHR directed against Respondent, which denied the allegations. On October 1, 2001, FCHR issued a Determination: No Jurisdiction and advised Petitioner that she had 35 days to file a Petition for Relief in order to challenge FCHR's determination. Petitioner timely filed her Petition for Relief, and this matter was referred to the Division of Administrative Hearings (DOAH) for a formal hearing.

On February 15, 2002, the undersigned Administrative Law Judge issued a Recommended Order of Dismissal to which the Respondent timely filed exceptions. On November 8, 2002, FCHR entered an Order Remanding Petition for Relief from an Unlawful Employment Practice, and this case was re-opened.

Following a case management conference, the parties agreed to submit stipulated findings of fact, followed by memoranda of law and proposed conclusions of law in lieu of a formal hearing. On December 20, 2002, the parties submitted the Stipulated Facts of Petitioner and Respondent. Following the granting of a

Motion for Extension of Time, the parties submitted their proposals on January 9 and 10, 2003, respectively. All submittals have been given careful consideration in the preparation of this Recommended Order.

FINDINGS OF FACT

1. Joanne McShane, Petitioner, was employed with the Brevard County Sheriff's Office, Respondent, from October 1981 to December 1982.

2. After Petitioner's employment with Respondent was terminated, Petitioner filed a complaint with FCHR and the United States Equal Employment Opportunity Commission (EEOC) alleging disparate treatment based upon her gender, among other things. Thereafter, Petitioner brought a civil action based on her charges in the United States District Court for the Middle District of Florida, and the parties to that action settled Petitioner's lawsuit in 1986.

3. On or about April 30, 1999, Petitioner executed a Charge of Discrimination that was filed on or about May 4, 1999, with FCHR. It provides in pertinent part:

I was retaliated against by my former employer Brevard County Sheriff's Office (BCSO) at least between the months of October 19, 1998 and March 4, 1999, because of my prior Title VII lawsuit against them . . . . The BCSO provided misleading, derogatory and some false information, defaming me, to my most recent employer

which resulted in my being discriminated against by my most recent employer . . . .

I determined subsequently that the BSCO provided not only a bad reference, but also, provided information which was misleading, false and could not be considered part of any personnel file, nor any public record. I have been retaliated against and defamed by Brevard County Sheriff's Office for my participation in a Title VII lawsuit against them years ago, in violation of . . . applicable state statutes . . . .

4. Respondent denied some of Petitioner's allegations contained in the Charge of Discrimination and filed affirmative defenses to others.

5. On or about October 1, 2001, FCHR issued a Notice of Determination: No Jurisdiction finding that it did not possess jurisdiction over the claims of Petitioner as set forth in her charge. The Notice of Determination specifically stated that "[since] the Commission lacks jurisdiction over the Complaint of Discrimination, the determination will not address the merits of the allegations contained in the complaint." The Notice of Determination instructed Petitioner that a Request for Hearing/Petition for Relief "must be filed within 35 days of mailing of this notice." It prescribed, through enclosing a Petition for Relief form, what the contents needed to be. Neither the Determination: No Jurisdiction, nor the Notice of Determination advised Petitioner that she had the right to bring a civil action in federal or circuit court or any other rights.

Thus, Petitioner, acting pro se, filed a Request for Hearing/Petition for Relief that sought review of the merits as well as the threshold issue of jurisdiction.

6. On or about January 15, 2002, through counsel who had recently appeared, Petitioner filed a Suggestion of Absence of Jurisdiction, arguing that the Florida Civil Rights Act (FCRA) provided two, and only two, circumstances under which a complainant who has filed an administrative charge of discrimination with FCHR either can or must proceed administratively by electing a hearing before DOAH: One, "[i]n the event that the commission determines that there is reasonable cause to believe that a discriminatory practice has occurred," Section 760.11(4), Florida Statutes, the complainant "may" request a DOAH hearing in lieu of filing a civil action, in which case the election of remedies is irreversible; and Two, "[i]f the commission determines that there is not reasonable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred," the complainant may only proceed to court if she prevails through a process that begins with a DOAH hearing. Section 760.11(7), Florida Statutes. Petitioner asserted that because neither of these conditions precedent to invoking DOAH's jurisdiction had been met in this case, DOAH had no basis to assert jurisdiction over the merits of the case and must remand it to FCHR.

7. On February 15, 2002, the undersigned Administrative Law Judge issued a Recommended Order of Dismissal, finding that neither of the conditions precedent to DOAH's jurisdiction established by Section 760.11(4) or (7), Florida Statutes, had been satisfied and recommended that FCHR resume jurisdiction to complete its investigation or to permit Petitioner to elect her remedies pursuant to Section 760.11(8), Florida Statutes.

8. On November 8, 2002, FCHR entered an Order Remanding Petition for Relief from an Unlawful Employment Practice back to DOAH for the purpose of resolving disputed issues of material fact regarding whether FCHR has jurisdiction of this matter.

9. Upon review of the complete record in this matter, including the Stipulated Facts of Petitioner and Respondent, it appears that there are no disputed facts that relate to the issue of whether FCHR has jurisdiction in this matter.

#### CONCLUSIONS OF LAW

10. In view of the Order Remanding Petition for Relief from an Unlawful Employment Practice, dated November 8, 2002, the Division of Administrative Hearings has jurisdiction of the subject matter and the parties to this action, pursuant to Sections 120.569, 120.57(1), 760.06(12), and 760.11(14), Florida Statutes, and Rules 60Y-5.008(3) and 60Y-4.016, Florida Administrative Code.

11. The burden is on the party asserting the affirmative of an issue in an administrative proceeding. Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla. 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla. 1st DCA 1977). Therefore, in order to prevail in this proceeding, Petitioner is required to prove the jurisdiction of FCHR. Petitioner has not met her burden in this case.

12. In Petitioner's charge to FCHR, Petitioner relies upon two elements. First, Petitioner asserts that Respondent breached the terms of a settlement agreement between Petitioner and the present Sheriff's predecessor in office (C.W. Miller) when: (1) the present Sheriff or his predecessor in office failed to destroy materials contained in Petitioner's personnel files as a part of the settlement agreement; and (2) the present Sheriff disclosed to the Monroe County Sheriff materials found in Petitioner's personnel file related to her previous discipline or claims against the present Sheriff's predecessor in office that either were not to be disclosed or were unfavorable to Petitioner. Second, Petitioner asserts Respondent acted in retaliation for her previously filing a charge of discrimination against the present Sheriff's predecessor in office in the 1980's when the Sheriff provided

information to the Monroe County Sheriff's Office that Petitioner alleges to be unfavorable.

13. Regardless of which aspect of Petitioner's claim is considered, FCHR properly declined to exercise jurisdiction. To the extent Petitioner asserts that Respondent breached the terms of a settlement agreement between Petitioner and the present Sheriff's predecessor in office, Petitioner cannot proceed before FCHR on these claims. Enforcement of a settlement agreement is not within the jurisdiction conferred upon FCHR under Chapter 760, Florida Statutes. There is no provision found in Sections 760.01, 760.04, 760.05 or 760.06 of the Florida Statutes that provides FCHR with jurisdiction to enforce settlement agreements that are violated, even if those agreements arise out of a charge originally filed with FCHR. In this instance, the settlement agreement arose out of litigation in the federal court system. It is not the role of FCHR to usurp the jurisdiction of federal or state courts to enforce matters occurring during the course of proceedings in the court system. Moreover, there is no provision found in Section 760.07, 760.10 or 760.11, Florida Statutes, that would make the breach of a settlement agreement an unlawful employment practice. Thus, FCHR properly declined to exercise jurisdiction over this aspect of Petitioner's charge.



14. Section 760.10(7), Florida Statutes, provides in pertinent part:

It is an unlawful employment practice for an employer . . . to discriminate against any person because that person has opposed any practice which is an unlawful employment practice under this section, or because that person has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this section.

This section mirrors the language found in the comparable provisions of Title VII of the federal act.

15. In order to prove a prima facie case, Petitioner must establish the following elements: (a) Petitioner engaged in protected opposition to discrimination; (b) Petitioner was disadvantaged by action of the employer simultaneously with, or subsequent to, such opposition; and (c) there is a casual connection between the protected activity and the adverse employment action. Morgan v. City of Jasper, 959 F.2d 1542 at 1547 (11th Cir. 1992).

16. Taking Petitioner's charge at face value, it fails to allege sufficient facts to establish a prima facie case of retaliation. Using the above-referenced standards, FCHR had a sufficient basis for the denial of jurisdiction. Petitioner's own allegations illustrate the absence of any facts that can meet the test to establish a claim of retaliation. The alleged retaliatory activities took place long after the termination of

her employment with Respondent and was therefore not an adverse employment action. Under Section 760.10(7), Florida Statutes, it is the employer's discharge or other employment impairment that evidences actionable retaliation, and not events 12 years subsequent to and unrelated to her employment. Koelsch v. Beltone Elec. Corp., 46 F.3d 705, 709 (7th Cir. 1995); and Reed v. Shepard, 939 F.2d 484, 492-93 (7th Cir. 1991).

RECOMMENDATION

Based upon the Stipulations of Fact and Conclusions of Law, it is hereby

RECOMMENDED that the Florida Commission on Human Relations enter a final order finding that it lacks jurisdiction over the charges of Petitioner and dismiss the Petition.

DONE AND ENTERED this 14th day of February, 2003, in Tallahassee, Leon County, Florida.

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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 14th day of February, 2003.

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.