

12-31-02

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

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DIVISION OF
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AP

ALICE BROOKS CESARIN,

EEOC Case No. 15D980881

Petitioner,

FCHR Case No. 98-2573

v.

DOAH Case No. 01-4805

TKW-CWS

DILLARDS, INC.,

FCHR Order No. 03-037

Respondent.

**FINAL ORDER DISMISSING PETITION FOR
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE**

Preliminary Matters

Petitioner Alice Brooks Cesarin filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (1997), alleging that Respondent Dillards, Inc., committed an unlawful employment practice on the basis of Petitioner's race (Black), sex (female), and on the basis of retaliation, in the terms and conditions of employment to which she was subjected, and when it terminated Petitioner from her position.

The allegations set forth in the complaint were investigated, and, on October 26, 2001, the Executive Director issued his amended determination finding that there was no reasonable cause to believe that an unlawful employment practice had occurred.

Petitioner filed a Petition for Relief from an Unlawful Employment Practice, and the case was transmitted to the Division of Administrative Hearings for the conduct of a formal proceeding.

An evidentiary hearing was held in Orlando, Florida, on October 10, 2002, before Administrative Law Judge T. Kent Wetherell, II.

Judge Wetherell issued a Recommended Order of dismissal on December 31, 2002.

Pursuant to notice, public deliberations were held on April 9, 2003, by means of Communications Media Technology (namely, telephone) before this panel of Commissioners. The public access point for these telephonic deliberations was the Office of the Florida Commission on Human Relations, 2009 Apalachee Parkway, Suite 100, Tallahassee, Florida, 32301. At these deliberations, the Commission panel determined the action to be taken on the Petition for Relief.

Motion to Withdraw as Counsel

On March 26, 2003, after the issuance of the Notice of Commission Deliberation in this matter, Petitioner's counsel, Michael L. Moore, filed with the Commission a Motion to Withdraw as Counsel. The motion was considered by this panel of Commissioners on April 9, 2003, as a preliminary matter to the panel's consideration of the action to be taken on the Petition for Relief and Recommended Order.

The motion was granted by the Commission panel on April 9, 2003, prior to the Commission panel's consideration of the matters set out in the Notice of Commission Deliberation.

Findings of Fact

With the limitation, set out below, relating to the timeliness of the Petition for Relief, we find the Administrative Law Judge's findings of fact to be supported by competent substantial evidence.

We adopt the Administrative Law Judge's findings of fact, with the limitation, set out below, relating to the timeliness of the Petition for Relief.

Conclusions of Law

We find the Administrative Law Judge's application of the law to the facts to result in a correct disposition of the matter.

We note that the Administrative Law Judge concluded that one of the elements Petitioner must show to establish a prima facie case of race discrimination is that she is a member of a "protected minority," and that another of the elements could be to show that her former position was filled by a "non minority." Recommended Order, ¶ 59.

People of all races are entitled to establish race discrimination claims under the Florida Civil Rights Act of 1992, not just those belonging to a "protected minority."

The Commission has adopted conclusions of law that reflect that to establish a prima facie case of discrimination in a termination case, such as the instant case, the first element Petitioner must demonstrate is "that he belongs to a group protected by the statute..." See Martinez v. Orange County Fleet Manager, 21 F.A.L.R. 163, at 164 (FCHR 1997), citing Arnold v. Department of Health and Rehabilitative Services, 16 F.A.L.R. 576, at 582 (FCHR 1993).

We, accordingly, correct the Administrative Law Judge's language referenced above, to be consistent with that set out in Martinez, supra.

In modifying the indicated conclusion of law of the Administrative Law Judge, we conclude: (1) that the conclusion of law being modified is one over which the Commission has substantive jurisdiction, namely a conclusion of law stating what must be demonstrated to establish a prima facie case of unlawful discrimination under the Florida Civil Rights Act of

1992; (2) that the reason the modification is being made by the Commission is that the conclusion of law as stated runs contrary to previous Commission decisions on the issue; and (3) that in making this modification the conclusion of law being substituted is as or more reasonable than the conclusion of law being rejected. See, Section 120.57(1)(1), Florida Statutes (2001).

Finally, we note that this correction to the conclusions of law does not affect the outcome of the case given the Administrative Law Judge's conclusion that even if Petitioner had established a prima facie case of discrimination, Respondent articulated a legitimate, nondiscriminatory reason for terminating Petitioner, and that there is no evidence establishing this explanation to be pretextual. Recommended Order, ¶ 63, ¶ 66 and ¶ 68.

With the indicated correction, and with the limitation set out below relating to the timeliness of the Petition for Relief, we adopt the Administrative Law Judge's conclusions of law.

Timeliness of Petition for Relief

The Administrative Law Judge made extensive findings of fact (Recommended Order, ¶ 26 through ¶ 41), and conclusions of law (Recommended Order, ¶ 43 through ¶ 54), leading to the conclusion that Petitioner's Petition for Relief should be dismissed because it was not timely filed.

Since we have found the Administrative Law Judge's finding on the merits that no unlawful employment practice occurred to be supported by competent, substantial evidence in the record, and have concluded that no harmful error of law was made by the Administrative Law Judge in reaching this conclusion, we find it unnecessary for the Commission to either adopt or reject the findings of fact and conclusions of law on the issue of the timeliness of the Petition for Relief. See Kalmbacher v. Department of Environmental Protection, 23 F.A.L.R. 3377, at 3378 (FCHR 2001) and Olivera v. City of Hallandale, FCHR Order No. 02-025 (FCHR 2002) where, in both cases, a Commission panel indicated that since the Administrative Law Judge decided the case on the merits it was unnecessary for the Commission to either accept or reject conclusions of law that the complaint in the matter was not timely filed.

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order, in a document entitled, "Exception."

Petitioner's filing includes exceptions to the conclusion that the Petition for Relief was not timely filed. See Filing.

Because we have concluded, supra, that it is unnecessary for the Commission to either accept or reject this conclusion, given our adoption of the Administrative Law Judge's recommendation on the merits that no unlawful employment practice occurred, we reject these exceptions.

The remaining exceptions appear to take issue with the facts found from the evidence presented and the inferences drawn by the Administrative Law Judge from the facts found. See Filing.

The Commission has stated, "It is well settled that it is the Administrative Law Judge's function 'to consider all of the evidence presented and reach ultimate conclusions of fact based on competent substantial evidence by resolving conflicts, judging the credibility of witnesses and drawing permissible inferences therefrom. If the evidence presented supports two inconsistent findings, it is the Administrative Law Judge's role to decide between them.' Beckton v. Department of Children and Family Services, 21 F.A.L.R. 1735, at 1736 (FCHR 1998), citing Maggio v. Martin Marietta Aerospace, 9 F.A.L.R. 2168, at 2171 (FCHR 1986)." Barr v. Columbia Ocala Regional Medical Center, 22 F.A.L.R. 1729, at 1730 (FCHR 1999).

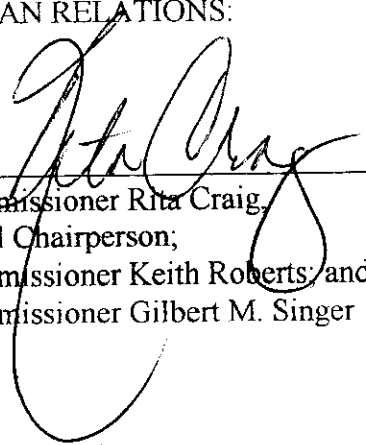
We reject these exceptions, as well

Dismissal

The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

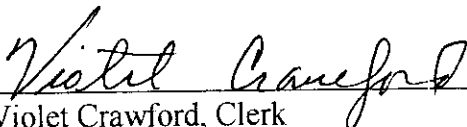
The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this Order is filed with the Clerk of the Commission. Explanation of the right to appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure 9.110.

DONE AND ORDERED this 29th day of April, 2003.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:



Commissioner Rita Craig,
Panel Chairperson,
Commissioner Keith Roberts and
Commissioner Gilbert M. Singer

Filed this 29th day of April, 2003,
in Tallahassee, Florida.


Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, FL 32301
(850) 488-7082

NOTICE TO COMPLAINANT / PETITIONER

As your complaint was filed under Title VII of the Civil Rights Act of 1964, which is enforced by the U.S. Equal Employment Opportunity Commission (EEOC) you have the right to request EEOC to review this Commission's final agency action. To secure a "substantial weight review" by EEOC, you must request it in writing within 15 days of your receipt of this Order. Send your request to Miami District Office (EEOC), One Biscayne Tower, 2 South Biscayne Blvd., Suite 2700, 27th Floor, Miami, FL 33131.

Copies furnished to:

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Dillard's, Inc.
c/o Latesa K. Bailey, Esq.
c/o Kevin D. Zwetsch, Esq.
Fowler, White, Gillen, Boggs, Villareal & Banker, P.A.
Post Office Box 1438
Tampa, FL 33601

T. Kent Wetherell, II, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 29th day of April, 2003.

By: *Viola Crawford*
Clerk of the Commission
Florida Commission on Human Relations