STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

OGHENERHORO BAMAWO,

Petitioner,

v.

DEPARTMENT OF CORRECTIONS,

Respondent.
_____/

EEOC Case No. NONE

FCHR Case No. 21-02010

DOAH Case No. 02-3786

FCHR Order No. 04-085

FINAL ORDER DISMISSING PETITION FOR RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE

Preliminary Matters

Petitioner Oghenerhoro Bamawo filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (1999), alleging that Respondent Department of Corrections committed unlawful employment practices on the basis of Petitioner's race (Black), color (Black) and national origin (African/Nigerian) by treating Petitioner differently than nonclass members in the terms and conditions of his employment, by creating a hostile work environment, and by terminating Petitioner. Petitioner also alleged his termination to amount to unlawful retaliation.

The allegations set forth in the complaint were investigated, and, on August 22, 2002, the Executive Director issued his 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 Miami, Florida, on July 25, 2003, before Administrative Law Judge Patricia Hart Malono.

Judge Malono issued a Recommended Order of dismissal, dated September 18, 2003.

Pursuant to notice, public deliberations were held on June 22, 2004, 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.

Findings of Fact

A transcript of the proceeding before the Administrative Law Judge was not filed with the Commission.

We adopt the Administrative Law Judge's findings of fact.

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.

The Administrative Law Judge indicated that to establish a prima facie case of race and national origin discrimination Petitioner must show that "(1) he belongs to a racial minority [and/or is foreign-born]; (2) he was subjected to adverse job action; (3) his employer treated similarly situated employees outside his classification more favorably; and (4) he was qualified for the job." Recommended Order, ¶ 31.

The first element of this test needs correction in two regards.

First, the Administrative Law Judge concluded that one of the elements Petitioner must show to establish a prima facie case of race discrimination is that "he belongs to a racial minority." Recommended Order, ¶ 31.

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 "racial minority."

The Commission has adopted conclusions of law that reflect that to establish a prima facie case of discrimination one of the elements 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 correct the Administrative Law Judge's language referenced, above, to be consistent with that set out in Martinez, supra. Accord, Cesarin v. Dillards, Inc., FCHR Order No. 03-037 (April 29, 2003) and Saint Fleur v. Superior Protection, FCHR Order No. 03-072 (November 21, 2003), both in which similar corrections were made by the Commission under similar circumstances.

Second, the Administrative Law Judge indicates that to establish a prima facie case of national origin discrimination Petitioner must demonstrate that he is "foreign-born." Recommended Order, ¶ 31. While such a showing would establish "protected group" status for a national origin discrimination case, it is not the only way membership in a "protected group" can be established in a national origin discrimination case.

The definitions section of the Florida Civil Rights Act of 1992 states, "'National origin' includes ancestry." Section 760.02(5), Florida Statutes (2003). The U.S. Equal Employment Opportunity Commission's "Guidelines on Discrimination Because of National Origin" state, "The Commission defines national origin discrimination broadly as including, but not limited to, the denial of equal employment opportunity because of an individual's, or his or her ancestor's,

place of origin; or because an individual has the physical, cultural or linguistic characteristics of a national origin group."

We modify the Administrative Law Judge's conclusion of law to reflect that establishing that one is "foreign-born" is not the only way one can establish "protected group" status in a national origin discrimination case.

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 with regard to the "racial minority" issue and contrary to statute with regard to the "foreign-born" 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)(l), Florida Statutes (2003).

With the modification indicated to the conclusion of law set out at Recommended Order, ¶ 31, we adopt the Administrative Law Judge's conclusions of law.

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled "Submittion (sp.) of Exceptions."

Petitioner's exceptions take issue with facts found by the Administrative Law Judge and inferences drawn from the evidence presented.

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).

Further, as indicated above, the Commission's file does not contain a transcript of the proceeding on the merits before the Administrative Law Judge. With regard to findings of fact set out in Recommended Orders, the Administrative Procedure Act states, "The agency may not reject or modify the findings of fact unless the agency first determines from a review *of the entire record*, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law [emphasis added]." Section 120.57(1)(l), Florida Statutes (2003). In the absence of a transcript of the proceeding before the Administrative Law Judge, the Recommended Order is the only evidence for the Commission to

consider. See, National Industries, Inc. v. Commission on Human Relations, et al., 527 So. 2d 894, at 897, 898 (Fla. 5th DCA 1988).

Based on the foregoing, Petitioner's exceptions are rejected.

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 30th day of June, 2004.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam,
Panel Chairperson;
Commissioner Mario M. Valle; and
Commissioner Gilbert M. Singer

Filed this 30th day of June, 2004,
in Tallahassee, Florida.

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Patricia Hart Malono, 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 30th day of June, 2004.

By: Violet Crawford
Clerk of the Commission
Florida Commission on Human Relations