

3-31-04

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

FILED
2004 AUG 11 A 11:59
DIVISION OF
ADMINISTRATIVE
SERVICES

WILLIE B. SMITH,

EEOC Case No. NONE

Petitioner,

FCHR Case No. 22-00669

v.

AT

DOAH Case No. 03-0197

SFD-CWS

DEPARTMENT OF CHILDREN AND
FAMILY SERVICES,
Respondent.

FCHR Order No. 04-100

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

Petitioner, WILLIE B. SMITH, filed a complaint of discrimination pursuant to Florida Civil Rights Act of 1992, Sections 760.01-760.11, Florida Statutes, alleging that the Respondent, DEPARTMENT OF CHILDREN AND FAMILY SERVICES, committed an unlawful employment practice by reprimanding and involuntarily transferring him due to his race (black) and in retaliation. The allegations set forth in the complaint were investigated and on December 11, 2002, the Executive Director issued his determination that there was no reasonable cause to believe that a discriminatory act occurred. The Petitioner filed a Petition for Relief and was granted a formal evidentiary hearing that was held in Chattahoochee, Florida, on March 9, 2004, before Administrative Law Judge Stephen F. Dean.

Judge Dean issued a Recommended Order of Dismissal dated March 31, 2004.

The Commission panel designated below considered the record of this matter and determined the action to be taken on the Recommended Order. The hearing was held via telecommunications technology on July 22, 2004, after notice to all parties on June 24, 2004. Neither the Petitioner, or his representative, made an appearance. After being informed by the General Counsel that the Personal Representative may be out of town on the day of the hearing, and finding no written communication requesting a continuance, the legal advisor to the panel made telephone calls to the Petitioner's Representative and left word at both work and personal telephone numbers. The legal advisor mentioned the phone call to the General Counsel to the panel but, upon determining that the hearing was telephonic and easily accessible from anywhere in the United States, the chairperson ruled that the hearing should be held.

Findings of Fact and Conclusions of Law

The Commission's file contains a no transcript of the proceeding before the Administrative Law Judge. In the absence of a transcript of the proceeding before the Administrative Law Judge, his Recommended Order is the only evidence for the Commission to consider. National Industries, Inc. vs. Commission on Human Relations, et al., 527 So. 2d 894, at 898 (Fla. 5th DCA 1988).

With regard to the steps necessary for establishing that an unlawful employment practice has occurred, it has been stated, "The initial burden is upon Petitioner to establish a prima facie case of discrimination. Once Petitioner established a prima facie case, a presumption of unlawful discrimination is created. The burden then shifts to Respondent to show a legitimate, nondiscriminatory reason for its action. If Respondent carries this burden, Petitioner then must prove by a preponderance of the evidence that the reason offered by the Respondent is not its true reason, but only a pretext for discrimination." See conclusions of law adopted by a Commission panel in Spradlin vs. Washington Mutual Bank, d/b/a Great Western, 23 F.A.L.R. 3359, at 3364, 3365 (FCHR 2001), citations from the quoted statement omitted.

The ALJ found that the Petitioner failed to show that his transfer, which is fact was a re-assignment under the terms of the collective bargaining agreement to which the Petitioner was subject, was an adverse personnel action. In fact, evidence pointed to the fact that not only was Respondent allowed to re-assign personnel at will and not be subject to union grievance, but also it was voluntary. In addition, evidence was presented and accepted that the written letter of reprimand was given for Petitioner's absencing himself from his post without authority which could have resulted in dismissal. The Respondent showed sufficient cause to issue a written reprimand, which it did in accordance with its internal procedures. The ALJ further found that none of the evidence presented indicates that the discipline imposed, which was at the minimal level, was a pretext for racial or other illegal discriminatory animus.

We adopt the Administrative Law Judge's findings of fact and conclusions of law

Exceptions

Petitioner filed exceptions to the Administrative law Judge's Recommended order in a document titled "Rebuttal to final hearing of Case No. 03-0197" in which his representative outlined fourteen (14) exceptions which were:

a. first, that Petitioner could not have received a letter of reprimand after submitting a complaint to the Commission. This is not true. While, Respondent could not have been issued a letter of reprimand in retaliation for filing a complaint with the Commission, Respondent was still free to reprimand Petitioner for his conduct. Respondent was reprimanded for being Absent without Authorized Leave on November 15, 2001. An investigation was initiated on November 15, 2001, regarding the incident and at the conclusion of the investigation, January 7, 2002, a written reprimand was issued.

b. second, that Respondent's written reprimands must be based on facts and information and not hearsay and unfounded conclusions and in that the written reprimand Petitioner received was not based on one fact. This is not true. Petitioner admits that he was away from his post for approximately one and half (1 ½) to two (2) hours. Further, Supervisor Williams can testify that Petitioner was not at his post nor did he request to be absent from his post for that length of time. The written reprimand was based on the testimony of Williams, other co-workers and Petitioner, not hearsay.

c. third, that Petitioner supplied proof that he was sick on date of the incident. This is irrelevant, because the issue was not whether Petitioner was sick but whether he notified his Supervisor that he would be absent for an extended period of time. Further, Petitioner has never alleged that he was so sick that he was unable to contact his supervisor.

d. fourth, regarding the grievance process is not supported by any evidence in the record and is irrelevant.

e. fifth, that the incident occurred on November 14, 2001 rather than November 15, 2001, as the ALJ concluded. There is substantial competent evidence in the record to support the ALJ's finding that the incident occurred in the early morning on November 15, 2001. Further, the change in date would be irrelevant.

f. sixth, that Williams should have issued the reprimand. Williams did not issue the written reprimand because he was not Petitioner's immediate supervisor at the time of the incident. Respondent's policy states that an employee's immediate supervisor has the duty to issue any reprimands.

g. seventh, that the written reprimand Petitioner received might be used in progressive discipline. The possibility that Petitioner's reprimand may be used in progressive discipline is irrelevant and adds no evidence to indicate whether Petitioner was discriminated against.

h. eighth, that Petitioner was not given the Florida State Hospital Policy until sixteen (16) months after the alleged incident. The ALJ found that Petitioner had received the policy manual. Petitioner has not provided any proof that the ALJ did not have competent substantial evidence to support his finding, nor did Petitioner provide any evidence to support this view at the hearing.

i. ninth, that Petitioner should not have received a written reprimand after filing a complaint with the Commission under the State of Florida Whistle Blower Statute. The statute only protects against retaliation, again, Petitioner was disciplined at the conclusion of Respondent's investigation, for Absence without Authorized Leave for an incident that occurred on November 15, 2001. Further, Petitioner filed a complaint with the Commission alleging retaliation on January 3, 2002, approximately four days before the written reprimand was issued.

j. tenth, that PBA representative, Steve Mears, committed perjury at the formal hearing by stating that Petitioner's re-assignment was voluntary. Whether or not Mears committed perjury is irrelevant, because the ALJ concluded that the Petitioner's re-assignment was not an adverse employment action.

k. eleventh, that Howell, Petitioner's new supervisor who issued the written reprimand, did not write the reprimand. This fact, if true, is irrelevant.

l. twelfth, that Petitioner contests the way the supervisor saw the incident but provided nothing to show that the record did not contain evidence to support the ALJ's findings of fact.

l. thirteenth, that Petitioner has made multiple charges of atrocities and racial injustices. However, Petitioner did not provide the ALJ proof of any earlier complaints to the Commission or any internal complaints made to Respondent.

m. fourteenth, that another employee was not disciplined for falsifying his timesheet. This is not supported in the record and further, it is irrelevant because Petitioner was disciplined for Absence without Authorized Leave, not falsifying his time sheet.

As noted above, the Commission's file does not contain a transcript of the proceeding before the Administrative Law Judge. The filing of such a transcript is a requirement to the filing of exceptions to a Recommended Order. In the absence of a transcript of the proceeding before the Administrative Law Judge, his Recommended Order is the only evidence for the Commission to consider. National Industries, Inc. v. Commission on Human Relations, 527 So. 2d 894, 898 (Fla. 5th DCA 1988). Therefore, in the absence of a transcript, the Commission is


limited in its review to the facts found by the ALJ in the Recommended order and has ordered the exceptions stricken. See EBEH v. Consumer Credit Counseling Service of the Tampa Bay Area, Inc., 20 F.A.L.R. 3132, 3134 (FCHR 1998).

Dismissal

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

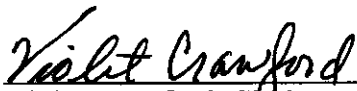
The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this Order is filed with the Clerk of the Commission. Explanation of the right to appeal is found in Section 120.68, Florida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

DONE AND ORDERED this 10th day of August, 2004.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS



Commissioner Gayle Cannon, Panel Chairperson
Commissioner John Corbett
Commissioner Keith A. Roberts

Filed this 10th day of August, 2004
in Tallahassee, Florida.



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Honorable Stephen F. Dean, Administrative Law Judge (DOAH)

Jim Tait, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 10th day of August, 2004.

BY: Kristi Crawford
Clerk of the Commission
Florida Commission on Human Relations