

2-12-04

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

KIRK CUMMINGS,

EEOC Case No. 15DA200997

Petitioner,

FCHR Case No. 22-02955

v.

AH

DOAH Case No. 03-2493

EJD/clw

UNIVERSITY OF FLORIDA,

FCHR Order No. 04-087

Respondent.

FILED
JUL - 1 AM 9:14
DIVISION OF
ADMINISTRATIVE
HEARINGS

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

Preliminary Matters

Petitioner Kirk Cummings filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2001), alleging that Respondent University of Florida committed unlawful employment practices on the basis of Petitioner's race (Black) when it failed to pay Petitioner, offering Petitioner a position as a volunteer, while paying Caucasians accepted for the same position; by failing to offer to pay Petitioner when money became available; and by terminating Petitioner as a teaching instructor.

The allegations set forth in the complaint were investigated, and, on June 2, 2003, 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 Gainesville, Florida, on November 3 and 4, 2003, before Administrative Law Judge Ella Jane P. Davis.

Judge Davis issued a Recommended Order of dismissal, dated February 12, 2004.

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

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.

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 Petition for Relief appears to allege that an unlawful employment practice occurred when Respondent removed Petitioner from the teaching component of the internship program. See Petition for Relief, ¶ 5.

The Administrative Law Judge concluded that there was no jurisdiction over any claims relating to Petitioner's work assignments as an unpaid intern because an employment relationship did not exist between Petitioner and Respondent, since no economic compensation was received. Recommended Order, ¶ 57 and ¶ 58.

Given the benefits of the unpaid internship conferred on the intern (i.e., "enhancement of the trainee's skills, resumes, and hireability" (Recommended Order, ¶ 3), "counseling experience and resume status that is valuable" (Recommended Order, ¶ 14), "academic credit" (Recommended Order, ¶ 14)), this to us seems to be a questionable conclusion.

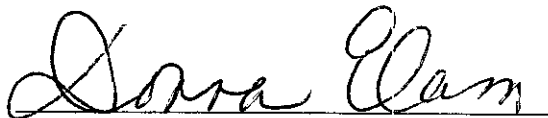
We conclude that it is unnecessary to either accept or reject this conclusion of law, since findings were made by the Administrative Law Judge that the removal of Petitioner from the teaching position was not discriminatory.

The Commission has adopted conclusions of law that reflect that to establish a prima facie case of discrimination in a termination case "the employee must prove (1) that he belongs to a group protected by the statute; (2) that he was qualified for the job; (3) that he was terminated; and (4) that after his termination, the employer hired a person not in petitioner's protected class or retained those having comparable or lessor qualifications, not in the protected class." 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).

Even assuming that a prima facie case of discrimination had been established in this instance, the findings of fact indicate a legitimate nondiscriminatory reason for terminating Petitioner from the teaching position was established, namely poor performance (Recommended Order, ¶ 36 and ¶ 37), and that there was no persuasive evidence that Petitioner's supervisor, Ms. Montero, had any racial motive in her written evaluation of Petitioner's teaching (Recommended Order, ¶ 38).

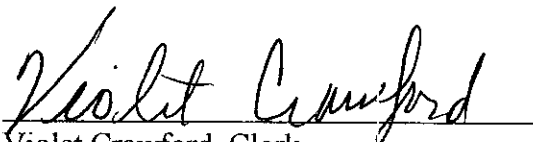
With this comment / limitation, we adopt the Administrative Law Judge's conclusions of law.

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.



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:

Kirk Cummings
Post Office Box 140508
Gainesville, FL 32614

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in a "memo" to Clerk of the Commission, Denise Crawford, dated February 26, 2004, and received by the Commission on February 27, 2004.

The exceptions take issue with the inferences drawn from the evidence presented and the credibility assigned by the Administrative Law Judge to the evidence presented (see exceptions document, specifically paragraphs 1, 2, 3, 4, 5, 6, 8, 9 and 11).

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).

Petitioner also generally excepts that the Administrative Law Judge used information in the findings of fact that was not presented in the transcript (see exceptions document, paragraph 7). The exceptions document does not specifically identify this information, and, therefore, it is unnecessary for the Commission to rule on this exception. See, Section 120.57(1)(k), Florida Statutes (2003), which states, "An agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record."

Finally, Petitioner appears to except to the conclusion that he was not an "employee" entitled to protection of the discrimination laws (see exceptions document, paragraphs 9 and 10). As indicated in the Conclusions of Law section of this Order, we find it unnecessary for the Commission to either accept or reject these conclusions of law since findings were made by the Administrative Law Judge that the removal of Petitioner from the teaching position was not discriminatory.

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.

FCHR Order No. 04-087
Page 5

University of Florida
c/o Charles M. Deal, Esq.
123 Tigert Hall
Gainesville, FL 32611-2703

Ella Jane P. Davis, 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