

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

FAMILY DOLLAR STORES, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 04-1647F  
 )  
 HEATHER H. STEWART, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

FINAL ORDER

This case arose on a petition filed with the Florida Commission on Human Relations, which determined that it lacked jurisdiction to consider an award of attorney's fees pursuant to Section 57.105, Florida Statute. The Florida Commission on Human Relations referred the petition to the Division of Administrative Hearings as though the petition were filed in error, and it was assigned to the undersigned who was the Administrative Law Judge assigned to the original case.

An Initial Order was issued requesting the parties to provide dates that they were available for hearing. In response, Petitioner in this case filed a response that provides, in pertinent part, that Petitioner does not believe that a hearing is necessary because Petitioner in the original case and Respondent in this cause did not appear for the final hearing after notice and had not requested a continuance.

Petitioner prays that the matter be determined without hearing based upon the record and the pleadings.

Petitioner herein request attorney's fees pursuant to Section 57.105, Florida Statutes, which provides as follows:

57.105 Attorney's fee; sanctions for raising unsupported claims or defenses; service of motions; damages for delay of litigation.

(1) Upon the court's initiative or motion of any party, the court shall award a reasonable attorney's fee to be paid to the prevailing party in equal amounts by the losing party and the losing party's attorney on any claim or defense at any time during a civil proceeding or action in which the court finds that the losing party or the losing party's attorney knew or should have known that a claim or defense when initially presented to the court or at any time before trial:

(a) Was not supported by the material facts necessary to establish the claim or defense; or

(b) Would not be supported by the application of then-existing law to those material facts.

Subsection (5) of this statute provides that in an administrative proceeding, the Administrative Law Judge shall award attorney's fees and damages in the same manner and upon the same basis as provided in Sections (1) through (4) of the statute. Such a determination shall be a final order.

Subsection (1) above, provides that attorney's fees may be awarded by the judge when the court finds that the losing party knew or should have known that the claim or defense when

initially presented to the court was not supported by the material facts necessary to establish the claim or defense or would not be supported by the application of the then-existing law to those material facts.

The award of attorney's fees is predicated upon a determination of the material facts. There was no factual determination in this case. The burden was upon the original Petitioner, who did not appear and did not present any facts. The award of fees would be appropriate if a petitioner did not plead or present a prima facie case. In the preceding case, the original Respondent did not file a motion to dismiss; therefore, the adequacy of the pleadings was not tested.

In a case in which Petitioner does not appear and does not present any evidence, it is impossible to determine whether the material facts support the pleadings. In human relations cases, the typical allegations are that the petitioner is a member of a protected class; the employer took some employment action that was adverse to the petitioner; and the motivation for taking the action was precluded by statute. Under the analysis of these cases advanced in McDonnell-Douglas v. Green, 411 U.S. 792, upon this showing, the employer must advance a non-discriminatory reason for the action, or the employee will prevail. If the employer makes this showing, the employee must show that the reason advanced by the employer is a pretext for discrimination.

Given the state of the law in such cases, in the absence of the presentation of any evidence by either party, it is impossible to determine whether the original Petitioner knew or should have known her claim was not supported by the material facts of the case. Therefore, the instant petition for fees is denied.

DONE AND ORDERED this 4th day of June, 2004, in Tallahassee, Leon County, Florida.



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STEPHEN F. DEAN  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 4th day of June, 2004.

COPIES FURNISHED:

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NOTICE OF RIGHT TO JUDICIAL REVIEW

A party who is adversely affected by this Final Order is entitled to judicial review pursuant to Section 120.68, Florida Statutes. Review proceedings are governed by the Florida Rules of Appellate Procedure. Such proceedings are commenced by filing the original notice of appeal with the Clerk of the Division of Administrative Hearings and a copy, accompanied by filing fees prescribed by law, with the District Court of Appeal, First District, or with the District Court of Appeal in the Appellate District where the party resides. The notice of appeal must be filed within 30 days of rendition of the order to be reviewed.