

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

TERRI TEAL,)
)
 Petitioner,)
)
 vs.) Case No. 04-1652
)
 DEPARTMENT OF CORRECTIONS,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER OF DISMISSAL

This cause came on for consideration of Respondent's Motion to Dismiss before Suzanne F. Hood, Administrative Law Judge with the Division of Administrative Hearings.

APPEARANCES

For Petitioner: Debra Dawn Cooper, Esquire
1008 West Garden Street
Pensacola, Florida 32501

For Respondent: Mark Simpson, Esquire
Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399

STATEMENT OF THE ISSUE

The issue is whether Petitioner's Petition for Relief should be dismissed as untimely pursuant to Section 760.11(7), Florida Statutes (2003).

PRELIMINARY STATEMENT

On April 29, 2004, Petitioner Terri Teal (Petitioner) filed a Petition for Relief with the Florida Commission on Human Relations (FCHR). The Petition alleged that Respondent Department of Corrections (Respondent) discriminated against Petitioner based on her sex in violation of Section 760.10(1), Florida Statutes (2003), and retaliated against her in violation of Section 760.10(7), Florida Statutes (2003).

FCHR referred the case to the Division of Administrative Hearings on May 5, 2004.

Respondent filed a unilateral Response to Initial Order on May 17, 2004. That same day, Respondent filed an Answer and a Claim for Attorney's Fees and Costs pursuant to Sections 120.595 and 760.11(7), Florida Statutes (2003).

On May 28, 2004, Respondent filed a Motion to Dismiss alleging that the Petition for Relief was untimely and therefore barred pursuant to Section 760.11(7), Florida Statutes (2003). Specifically, the motion alleged that the Petition for Relief was filed one day after the expiration of the 35-day period set forth in Section 760.11(7), Florida Statutes (2003).

On June 7, 2004, the undersigned issued an Order To Show Cause. The Order directed Petitioner to file a written response on or before June 18, 2004, showing why her Petition for Relief

should not be dismissed pursuant to Section 760.11(7), Florida Statutes (2003).

On June 18, 2004, Petitioner filed a written response to the Order to Show Cause, stating that that the Petition had been filed on April 28, 2004, by facsimile transmission, at 4:35 p.m. from Pensacola, Florida. Petitioner's written response did not include three facsimile transmission verification reports referred in the report as attached exhibits. Pursuant to a request from the undersigned's office, Petitioner filed the exhibits on June 22, 2004.

On June 22, 2004, Respondent filed a Response to Petitioner's Response to Order to Show Cause and to Respondent's Motion to Dismiss. Respondent asserts that the Petition for Relief, sent by facsimile transmission from Pensacola, Florida, at 4:26 p.m. C.S.T. on April 28, 2004, would not have been received by the FCHR until 5:35 p.m. E.S.T. and, pursuant to applicable rules in the Florida Administrative Code, would not have been filed until April 29, 2004, one day after expiration of the 35-day period.

On June 22, 2004, the parties filed a Joint Motion for Continuance. That same day, the undersigned issued an Order Granting Continuance and Rescheduling the hearing for August 9, 2004.

FINDINGS OF FACT

1. Petitioner filed a Charge of Discrimination with FCHR on June 30, 2003. Petitioner alleged that Respondent discriminated against her based on her sex and retaliated against her when she complained that her supervisor was sexually harassing her.

2. Finding no reasonable cause to believe that Respondent had committed an unlawful employment practice, FCHR issued a Determination: No Cause on March 24, 2004. That same day, FCHR issued a Notice of Determination: No Cause, advising Petitioner that she had 35 days from the date of the notice in which to request an administrative hearing. The notice clearly stated that Petitioner's claim would be dismissed pursuant to Section 760.11, Florida Statutes, if she failed to request a hearing in a timely manner. The 35th day was April 28, 2004.

3. Petitioner sent her Petition for Relief to FCHR by facsimile transmission on April 28, 2004, at 4:26 p.m. C.S.T. FCHR received the Petition on April 28, 2004, at 5:35 p.m. E.S.T. or 35 minutes after FCHR's normal business hours. Therefore, the Petition was not filed until April 29, 2004, one day after expiration of the 35-day period.

CONCLUSIONS OF LAW

4. The Division of Administrative Hearings has authority to determine whether it has jurisdiction over the parties and

the subject matter of this proceeding. §§ 120.569, 120.57(1), and 760.11, Fla. Stat. (2003).

5. Section 760.11(7), Florida Statutes (2003), states as follows, in relevant part:

(7) If the commission determines that there is not reasonable cause to believe that a violation of the Florida Civil Rights Act of 1992 has occurred, the commission shall dismiss the complaint. The aggrieved person may request an administrative hearing under ss. 120.569 and 120.57, but any such request must be made within 35 days of the date of determination of reasonable cause and any such hearing shall be heard by an administrative law judge and not by the commission or a commissioner. If the aggrieved person does not request an administrative hearing within the 35 days, the claim will be barred.

6. Florida Administrative Code Rule 60Y-3.001 provides the following relevant definitions:

(4) "Complaint" means a written statement which alleges the occurrence of an unlawful employment practice, and includes an amended complaint.

* * *

(22) "Petition" means a writing, other than a written motion, filed with the Commission pursuant to rule of the Commission asking that specified action be taken by the Commission or a Panel.

* * *

(29) "Date of filing" means a completed complaint is received by the Commission prior to 5:00 p.m. (Eastern time) as provided by Rule 28-106.104, F.A.C.

7. As to complaints, Florida Administrative Code Rule 60Y-5.001 states as follows, in relevant part:

(2) Time for filing. A complaint may be filed at anytime within 365 days of the occurrence of the alleged unlawful employment practice. . . .

(3) Place and Date of Filing. A complaint may be filed at the office of the Commission. The date of filing shall be the date of actual receipt of the complaint by the Clerk or other agent of the Commission. Any document received by the Clerk or other agent of the Commission after 5:00 p.m. (Eastern time) shall be filed as of 8:00 a.m. on the next regular business day.

8. A complaint may be administratively dismissed pursuant to Florida Administrative Code Rule 60Y-5.006, which states as follows, in pertinent part:

The Executive Director, on behalf of the Commission, shall dismiss a complaint upon one or more of the following grounds:

* * *

(3) The complaint has not been timely filed with the Commission;

(4) After service of Notice of Determination of Reasonable Cause, No Reasonable Cause, or No Jurisdiction, the complainant has failed to file a Petition for Relief pursuant to Rule 60Y-5.008, F.A.C.

* * *

(10) There is no jurisdiction over the respondent or subject matter of the complaint.

9. Regarding a Petition for Relief from an Unlawful Employment Practice, Florida Administrative Code Rule 60Y-5.008 states as follows, in relevant part:

(1) Petition. A complainant may file a Petition for Relief from an Unlawful Employment Practice within 35 days of the Date of Determination of Reasonable Cause, No Reasonable Cause, No Jurisdiction or Untimeliness. . . .

(2) For good cause shown, the Chairperson may grant an extension of time to file the Petition for Relief from an Unlawful Employment Practice, provided the motion for extension of time is filed within the 35-day period prescribed by subsection 60Y-5.008(1), F.A.C.

(3) Procedures. Petitions for Relief, and proceedings thereupon, are governed by the provision of Chapters 28-106 and 60Y-4, F.A.C., except as otherwise provided by this section.

10. Florida Administrative Code Rule 28-106.103 states as follows, in pertinent part:

In computing any period of time allowed by this chapter, by order of a presiding officer, or by any applicable statute, the day of the act from which the period of time begins to run shall not be included. . . . No additional time shall be added if service is made by hand, facsimile telephone transmission, or other electronic transmission or when the period of time begins pursuant to a type of notice described in Rule 28-106.111, F.A.C.

11. Florida Administrative Code Rule 28-106.104 states as follows, in relevant part:

(1) In construing these rules or any order of a presiding officer, filing shall mean received by the office of the agency clerk during normal business hours or by the presiding officer during the course of a hearing.

* * *

(3) Any document received by the office of the agency clerk after 5:00 p.m. shall be filed as of 8:00 a.m. on the next regular business day.

* * *

(9) The filing date for an electronically transmitted document shall be the date the agency clerk received that complete document.

12. In this case, Petitioner did not file a timely Petition for Relief. Pursuant to Section 760.11(7), Florida Statutes (2003), and the provision of the Florida Administrative Code referenced above, Petitioner's claim is barred because it was not timely filed.

13. The record here is insufficient to determine whether Respondent is entitled to attorney's fees pursuant to Sections 120.595 and 760.11(7), Florida Statutes (2003). Respondent's Claim for Attorney's Fees and Costs is denied.

RECOMMENDATION

Based on the foregoing Findings of Fact and Conclusions of Law, it is

RECOMMENDED:

That FCHR enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 25th day of June, 2004, in Tallahassee, Leon County, Florida.

S

SUZANNE F. HOOD
Administrative Law Judge
Division of Administrative Hearings
The DeSoto Building
1230 Apalachee Parkway
Tallahassee, Florida 32399-3060
(850) 488-9675 SUNCOM 278-9675
Fax Filing (850) 921-6847
www.doah.state.fl.us

Filed with the Clerk of the
Division of Administrative Hearings
this 25th day of June, 2004.

COPIES FURNISHED:

Denise Crawford, Agency Clerk
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

Mark Simpson, Esquire
Department of Corrections
2601 Blair Stone Road
Tallahassee, Florida 32399

Debra Dawn Cooper, Esquire
1008 West Garden Street
Pensacola, Florida 32501

Cecil Howard, General Counsel
Florida Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, Florida 32301

NOTICE OF RIGHT TO SUBMIT EXCEPTIONS

All parties have the right to submit written exceptions within 15 days from the date of this Recommended Order. Any exceptions to this Recommended Order should be filed with the agency that will issue the final order in this case.