

3.16.05

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

FILED

2005 JUN -2 P 2:26

KAMAL ASSILY,

EEOC Case No. NONE

Petitioner,

FCHR Case No. 23-01283

v.

DOAH Case No. 04-1762

MEMORIAL HOSPITAL OF TAMPA,

FCHR Order No. 05-059

Respondent.

AP

FLB
CLOSED

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

Preliminary Matters

Petitioner Kamal Assily 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 Memorial Hospital of Tampa committed unlawful employment practices on the basis of Petitioner's National Origin (unspecified) by denying Petitioner opportunities to establish an employment relationship afforded other workers of different National Origin, by subjecting Petitioner to disparate treatment because of his National Origin, and on the basis of retaliation.

The allegations set forth in the complaint were investigated, and, on April 13, 2004, the Executive Director issued his determination finding that the Commission did not have jurisdiction of the matter, concluding that Petitioner was not an "employee" of Respondent, but rather an "independent contractor," and that the Florida Civil Rights Act of 1992 does not protect "independent contractors."

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 by video teleconference at sites in Tampa and Tallahassee, Florida, on October 28, 2004, before Administrative Law Judge Fred L. Buckine.

Judge Buckine issued a Recommended Order of dismissal, dated March 16, 2005.

Pursuant to notice, public deliberations were held on May 24, 2005, 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.

The Administrative Law Judge indicated that to establish a prima facie case of race discrimination it must be shown that "(1) complainant belongs to a racial minority; (2) complainant applied for and was qualified for a job for which the employer was seeking applicants; (3) despite complainant's qualifications, complainant was rejected; and (4) after rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications." Recommended Order, ¶ 36.

The first element of this test needs correction.

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, Warren v. Department of Revenue, FCHR Order No. 04-152 (December 7, 2004), Bamawo v. Department of Corrections, FCHR Order No. 04-120 (September 22, 2004), Saint Fleur v. Superior Protection, FCHR Order No. 03-072 (November 21, 2003), and Cesarin v. Dillard's, Inc., FCHR Order No. 03-037 (April 29, 2003), all in which similar corrections were made by the Commission under similar circumstances.

We note that this correction will not affect the outcome of the case given the Administrative Law Judge's conclusion that Petitioner failed to adduce evidence of his protected group status, and given the Administrative Law Judge's conclusion that Petitioner was an "independent contractor," and, as such, was not entitled to the protections of the Florida Civil Rights Act of 1992.

In modifying the conclusions of law of the Administrative Law Judge as explained, supra, we find: (1) that the conclusions of law being modified are conclusions of law over which the Commission has substantive jurisdiction, namely conclusions 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 modifications are being made by the Commission is that the conclusions of law as stated

run contrary to previous Commission decisions on the issue; and (3) that in making these modifications the conclusions of law we are substituting are as or more reasonable than the conclusions of law which have been rejected. See, Section 120.57(1)(l), Florida Statutes (2003).

With these corrections and comments, 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 "Petitioner's Exceptions," received by the Commission on April 4, 2005. Petitioner also filed a document with purported "errors" in the transcript, which includes a request for oral argument on the exceptions document.

Petitioner's exceptions document raises some issues outside the "four corners" of the Recommended Order. Petitioner appears to except to the Administrative Law Judge's failure to recuse himself and to the allowance of Respondent's qualified representative in the matter. See Filing.

Recusal

With regard to the Administrative Law Judge's failure to recuse himself, in denying a similar exception a Commission panel has stated, "To be entitled to recusal, a movant must show more than that the Administrative Law Judge has entered some orders against the position of the movant - rather the movant must 'have a well-grounded fear that he would not receive a fair hearing. The fears of judicial bias must be objectively reasonable.' Palmer v. Agency for Health Care Administration, 20 F.A.L.R. 1234, at 1236, Order of Administrative Law Judge Mary Clark (June 21, 1996). Further, the assignment of Administrative Law Judges is within the purview of the Division of Administrative Hearings. See, Section 120.569(2)(a), Florida Statutes (1999)." Garrepy v. Department of Environmental Protection, FCHR Order No. 01-024 (April 19, 2001).

The Administrative Procedure Act states, "The agency in its final order may reject or modify conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction...The agency may not reject or modify 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." Section 120.57(1)(l), Florida Statutes (2003).

While, as indicated, the Commission can review the record of a case to determine whether the proceeding leading to the findings of fact in the Recommended Order meets with the essential requirements of law, it would appear unlikely that an Administrative Law Judge's refusal to recuse himself would amount to a conclusion of law within the substantive jurisdiction of the Commission.

Qualified Representative

While Petitioner appears to except to the Administrative Law Judge's allowance of Respondent's out-of-state attorney to serve as a qualified representative for Respondent, the record reflects that Petitioner's motion pointing out that the representative had not been qualified to appear was granted, Petitioner was relieved from all prior orders entered, request to appear as qualified representative was then made, and this request was then granted. See, Amended Order, dated September 2, 2004, and Order, dated September 2, 2004.

Recommended Order

With regard to the Recommended Order, in discussing the Preliminary Statement of the Recommended Order, Petitioner excepts that the Commission has not investigated the substantive allegations of his charges, the statement as to the Administrative Law Judge's handling of motions; and the manner in which documents were admitted into evidence. See Filing.

While it is true, the Commission has not investigated the substantive allegations of Petitioner's complaint, concluding that this was not necessary given its determination that Petitioner was an "independent contractor," not entitled to the protection of the Florida Civil Rights Act of 1992 (see "Determination: No Jurisdiction," second paragraph), it is the Petitioner, himself, who put the substantive issue of his complaint before the Administrative Law Judge through the content of his Petition for Relief (See, Petition for Relief from an Unlawful Employment Practice). Further, we note that the finding that Petitioner was an "independent contractor," not entitled to the protections of the Florida Civil Rights Act of 1992, is dispositive of the case.

With regard to the handling of motions and the manner in which documents were admitted into evidence, the conduct of proceedings is within the purview of the Administrative Law Judge. See, e.g., Fla. Admin. Code R. 28-106.211.

With regard to findings of fact, Petitioner excepted to any finding of fact in which the Administrative Law Judge's consideration of the observation of the witnesses and their demeanor is considered and the manner in which documents with redacted information were received into evidence (see exceptions document, page 14). Petitioner also sets out findings of fact and conclusions of law from his viewpoint, leading to the conclusion that, in his view, he was an "employee" rather than an "independent contractor." See Filing.

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).

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Finally, it does not appear that Petitioner's exception with regard to redacted information from exhibits presented would in any way impact the outcome of the case. In short, this "exception" does not appear to actually be an "exception" to the Recommended Order.

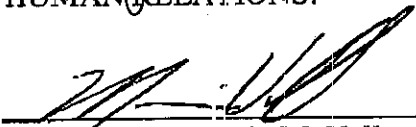
We reject Petitioner's exceptions.

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 31st day of May, 2005.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:



Commissioner Mario M. Valle,
Panel Chairperson;
Commissioner Gayle Cannon; and
Commissioner Billy Whitefox Staff

Filed this 31st day of May, 2005,
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, FL 32301
(850) 488-7082

Copies furnished to:

Kamal Assily
Post Office Box 3446
Tampa, FL 33601-3446

Memorial Hospital of Tampa
c/o Robert W. Horton, Esq.
Bass, Berry & Sims, PLC
315 Deadrick Street, Suite 2700
Nashville, TN 37238

Fred L. Buckine, 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 31st day of May, 2005.

By: Tracie Gaudin
Clerk of the Commission
Florida Commission on Human Relations