

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

IRVIN WALLACE, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 04-2619  
 )  
 FINFROCK, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing of this case on January 4, 2005, in Orlando, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: (No Appearance)

For Respondent: Charles E. Williams, Jr., Esquire  
Ford & Harrison LLP  
300 South Orange Avenue, Suite 1300  
Orlando, Florida 32801-3379

STATEMENT OF THE ISSUE

The issue is whether Respondent discriminated against Petitioner on the basis of his race in violation of Section 760.10, Florida Statutes (2003).

PRELIMINARY STATEMENT

On June 30, 2004, the Florida Commission on Human Relations (Commission) notified Petitioner that the Commission had determined there was no reasonable cause to believe an unlawful employment practice had occurred. Petitioner filed a Petition for Relief on July 9, 2004, and the Commission referred the matter to DOAH to conduct an administrative hearing. At the hearing, Petitioner did not appear and did not present any testimony.

Respondent submitted three exhibits for admission into evidence and called no witnesses to testify. The identity of the exhibits and the rulings regarding each are reported in the Transcript of the hearing filed with DOAH on February 16, 2005. Respondent timely filed its proposed recommended order (PRO) on February 24, 2005. Petitioner did not file a PRO.

FINDINGS OF FACT

1. No findings are made concerning the alleged discrimination. Petitioner did not appear and did not submit any evidence to support findings of fact.

2. Findings are required concerning the adequacy of notice of the administrative hearing. On March 9, 2005, Petitioner, through his qualified representative, filed Petitioner's Request for Final Hearing and Petitioner's Request for the Reopening of Discovery.

3. Petitioner received adequate notice of the administrative hearing. The Commission referred this matter to DOAH by cover letter dated July 19, 2004. DOAH assigned the matter to ALJ Fred L. Buckine and transferred it to the undersigned on October 26, 2004.

4. The record shows that the two ALJs issued 10 notices or orders in this proceeding between August 12 and December 1, 2004.<sup>1</sup> DOAH properly addressed, stamped, and delivered each notice and order by U.S. mail to the address of record for Petitioner, 1527 South Central Avenue, Apopka, Florida 32703. On and after August 30, 2004, DOAH also delivered a copy of each notice and order by U.S. mail to the qualified representative. The address of record for the qualified representative is the same as that for Petitioner. No notice or order was returned to DOAH as undelivered.

5. During the four months preceding the administrative hearing, Petitioner declined to participate in discovery due to the poor health of his qualified representative. Respondent requested two continuances in an effort to complete discovery. Petitioner declined to complete discovery, and Respondent moved to dismiss for failure to complete discovery. Respondent alleged the qualified representative was "physically unqualified" to represent Petitioner.

6. The undersigned denied Respondent's motion to dismiss and granted a motion for continuance filed by Petitioner on November 30, 2004. The motion for continuance was part of a document entitled, "Petitioner's Request for Continuance of Final Hearing and Injunctive Relief Against Retaliatory Termination" (Petitioner's Motion for Continuance).

Petitioner's Motion for Continuance discusses numerous grounds for the continuance and only parenthetically states that his qualified representative was in poor health. The Order Granting Continuance and Re-scheduling hearing included the following notice to Petitioner:

The undersigned deems Petitioner's motion for continuance to be based on the illness of Petitioner's Qualified Representative. Petitioner has had ample time to obtain a replacement for his Qualified Representative or to proceed pro se. The undersigned will grant no further continuances based on the illness of the Petitioner's Qualified Representative.

Order Granting Continuance and Re-scheduling Hearing, dated November 30, 2004.

7. Petitioner's Motion for Continuance expressly admits that Petitioner received delivery of relevant documents in this proceeding. In relevant part, Petitioner states:

1. On or about November 25 and 26, 2004, the Friday and Saturday following Thanksgiving, Petitioner, who receives the mail in this case at his address for both him and his Qualified Representative (who has been repeatedly hospitalized during this

case for the sudden occurrence of life-threatening congestive heart failure), received in those days' mail the following pleadings. . . . (emphasis added)

Petitioner's Motion for Continuance at 6.

9. Petitioner had actual notice of the administrative hearing. During the week preceding the hearing, staff at DOAH contacted Petitioner, in the normal course of prehearing procedure, and provided information concerning the date and time of the hearing.

10. Petitioner had ample time between the last order continuing the administrative hearing and the date of the hearing to file any motion for relief to which he was entitled for good cause or extreme emergency. Petitioner did not file a motion for relief. Petitioner did not represent that no other person was competent or capable of representing Petitioner except for his qualified representative.

11. At the administrative hearing, the undersigned telephoned Petitioner at a telephone number of record. Petitioner answered, and the undersigned asked Petitioner if he intended to attend the hearing. Petitioner refused to answer and directed the undersigned to Petitioner's qualified representative.

12. DOAH provided Petitioner and his qualified representative with adequate notice of the administrative

hearing, and the undersigned conducted the hearing. Petitioner chose to neither request a continuance of the hearing or attend the hearing. Petitioner now seeks to begin the process anew by filing post-hearing motions for an administrative hearing. The record does not support the remedy requested by Petitioner.

CONCLUSIONS OF LAW

13. DOAH has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2003). The parties received adequate notice of the administrative hearing.

14. The Notice of Hearing sent to the address of record for Petitioner and his qualified representative, like the other eight other notices and orders issued in this proceeding, was properly addressed, stamped, and mailed and was not returned. Mail properly addressed, stamped, and mailed is presumed to be received by the addressee if not returned. Brown v. Giffen Industries, Inc., 281 So. 2d 897, 900 (Fla. 1973).

15. There is no direct evidence of discrimination in this case. In the absence of such evidence, discrimination must be shown by circumstantial evidence.

16. The burden of proof in discrimination cases involving circumstantial evidence is set forth in McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802-03 (1973). Petitioner has the initial burden of establishing by a preponderance of the


evidence a prima facie case of discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA 1996), aff'd, 679 So. 2d 1183 (1996)(citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)).

RECOMMENDATION

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

RECOMMENDED that the Commission enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 14th day of March, 2005, in Tallahassee, Leon County, Florida.



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DANIEL MANRY  
Administrative Law Judge  
Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 14th day of March, 2005.

ENDNOTE

1/ The notices and orders mailed to Petitioner were: an Order of Pre-hearing Instructions and Notice of Hearing setting the hearing for September 24, 2004, both dated August 19, 2004; an

Order, dated August 31, 2004, appointing Mr. Vincent L. Cheves as the qualified representative for Petitioner; an Order Granting Continuance and Re-scheduling Hearing for October 29, 2004, dated September 14, 2004; an Order Extending Time to Complete Discovery, dated October 5, 2004; an Order Granting Continuance and Rescheduling Hearing for December 10, 2004, dated October 26, 2004; an Order Granting Motion to complete discovery and compelling discovery, dated November 23, 2004; an Order Granting Continuance and Re-scheduling Hearing for January 4, 2005, dated November 30, 2004; and an Order Denying Motions for Injunction, dated December 1, 2004.

COPIES FURNISHED:

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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.