

STATE OF FLORIDA  
DIVISION OF ADMINISTRATIVE HEARINGS

DEBRAH K. MANCHEGO, )  
 )  
 Petitioner, )  
 )  
 vs. ) Case No. 04-2804  
 )  
 COCOA LAKES APARTMENTS, )  
 )  
 Respondent. )  
 \_\_\_\_\_ )

RECOMMENDED ORDER OF DISMISSAL

This cause comes before Ella Jane P. Davis, an Administrative Law Judge of the Division of Administrative Hearings, without an evidentiary hearing, for resolution upon the pleadings and papers filed in a housing discrimination case referred by the Florida Commission on Human Relations (FCHR or Commission).

STATEMENT OF THE ISSUE

Does the Division of Administrative Hearings have jurisdiction of this housing discrimination petition?

PRELIMINARY STATEMENT

This cause was referred to the Division of Administrative Hearings (DOAH or Division) by FCHR on or about August 11, 2004.

On August 20, 2004, Respondent filed a Motion to Dismiss the Petition for Relief as untimely. Petitioner filed no timely response in opposition to the Motion as permitted by Florida

Administrative Code Rule 28-106.204. However, in an abundance of caution, a telephonic conference call was conducted on October 12, 2004, in order to permit Petitioner, who is proceeding pro se, to argue against the Motion to Dismiss.<sup>1/</sup>

After oral argument from both parties, an Order was entered on October 13, 2004, which allowed Petitioner until October 22, 2004, in which to file any additional exhibits or written arguments in opposition to the pending Motion. The October 13, 2004, Order further provided for Respondent to file any written rebuttal by October 27, 2004.

In response to the foregoing Order, Petitioner filed a "Motion for Continuance" [sic] claiming various medical conditions caused her to late-file her Petition before the Commission. Her additional exhibits were: a U.S. Postal "date of mailing/delivery receipt," a copy of Chapter 28-106 (particularly 28-106.103,) and page 6 from original instructions for filing a petition for relief/FCHR and copies of correspondence from Petitioner to one Stephen Brown. Respondent timely filed a "Rebuttal Memorandum."

So as to be fully advised in the premises, the undersigned next requested, and received, from the Commission a letter of explanation dated November 16, 2004, which has also been considered.

This Recommended Order of Dismissal is entered upon these representations and filed documents.

FINDING OF FACTS

1. Petitioner filed a Housing Discrimination Complaint with FCHR on or about October 22, 2002. It was assigned FCHR Case No. 23-90021H.

2. FCHR filed and mailed to the parties its document entitled "Determination of No Reasonable Cause" in FCHR Case No. 23-90021H, on June 28, 2004.<sup>2/</sup> This document was included in FCHR's referral packet forwarded to the Division of Administrative Hearings on or about August 11, 2004.

3. The November 6, 2004, letter from FCHR to the undersigned enclosed a copy of the actual Determination No Cause and the letter advised, in pertinent part, as follows:

The document [Determination of No Reasonable Cause] included in the referral packet is the Notice of Determination No Cause. It is noted in the Certificate of Service on the second page. The word NOTICE was inadvertently left off of the title of the document. (Bracketted material added for clarity.)

This piece of information is crucial to the timeliness issue at bar, because FCHR's rules refer to the "Notice of Determination," for timeliness issues.

4. The June 28, 2004 "Determination of No Reasonable Cause" a/k/a "the Notice of Determination No Cause" stated in pertinent part:

The parties are further advised that the Complainant may request that a formal administrative proceeding be conducted. The request (i.e. Petition for Relief) must be filed with the FCHR within 30 days of the date of mailing of this Notice and should be in compliance with the provisions of rule 60Y-8.001 and Chapter 60Y-4, Florida Administrative Code, entitled General Procedures. A Petition for Relief form is enclosed. If you elect to file a Petition for Relief, it may be beneficial to seek legal counsel prior to filing the Petition.

This action will not become final until time has expired for Complainant to file a Petition for Relief. Failure of Complainant to timely file a Petition will result in dismissal of the complaint within the purview of Rule 60Y-2.004(2)(g), Florida Administrative Code. (Emphasis supplied.)

5. Petitioner has provided a copy of the "Instructions for filing a Petition for Relief," which she received from FCHR with the foregoing Determination Notice and a blank Petition for Relief form. The instructions provided, in pertinent part:

For employment and public accommodation complaints, it [Petition for Relief] must be **received by the Commission no later than 35 days after the date of determination** in your case. For Housing cases, it must be **received by the Commission no later than 30 days after you receive a notice that the Commission has concluded its investigation.** The Commission will date-stamp the Petition

upon receipt. (Bracketed material provided for clarity. Underlining, boldface, and italics in original)

6. The Instructions also provided:

Return the completed form to the ***Clerk of the Commission at 2009 Apalachee Parkway, Suite 100, Tallahassee, Florida 32301-4857, within 35 days from the date of Determination.*** . . . This form must be received by the *Commission on or before the close of business on the 30th or 35th day, depending on your case type.* (Underlining, boldface, and italics in original.)

7. July 28, 2004 was the thirtieth day after June 28, 2004. July 28, 2004, was a Wednesday.

8. Petitioner has submitted proof that she mailed her Petition for Relief on August 2, 2004.

9. Petitioner's submittal and FCHR's date stamp show that her Petition was received, date-stamped, and filed by FCHR on August 3, 2004.

10. The Petition clearly has on it a check in the box marked "Housing Discrimination Practice," and it was signed by Petitioner on July 30, 2004.

11. On August 10, 2004, FCHR's Clerk signed the Transmittal of Petition, forwarding the case to the Division of Administrative Hearings for proceedings pursuant to Section 120.57, Florida Statutes, and Florida Administrative Code Rule 60Y-4.106(1).<sup>3/</sup>

12. For reasons unknown, FCHR's Transmittal of the Petition regarding Petitioner's housing discrimination practice erroneously recited:

Please be advised that the Florida Commission on Human Relations has received a Petition for Relief from an Unlawful Employment Practice by Debrah K. Manchego. (Emphasis supplied.)

13. Petitioner asserts that her several disabilities should be considered as a reason/excuse for the late filing of her Petition.

CONCLUSIONS OF LAW

14. The Division of Administrative Hearings has the authority and the obligation to determine jurisdiction in this matter.

15. Despite the rather peculiar use of the word "received" in FCHR's Instructions to Petitioner, the relevant FCHR Rule governing Fair Housing Discrimination Proceedings reads, in pertinent part, as follows:

60Y-8.001 Petition for Relief from a Discriminatory Housing Practice.

(1) Petition. A complainant may file a Petition for Relief from a Discriminatory Housing Practice within 30 days of service of a Notice of Determination (No Cause) or Notice of Determination (Cause). . . .

(2) For good cause shown, the Chairperson may grant an extension of time to the complainant to file the Petition for Relief,

provided the motion for extension of time is filed within the 30-day period.

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

16. By FCHR's Rule, Petitioner had until July 28, 2004, to file her Petition with FCHR. Petitioner signed her Petition on July 30, 2004, two days late. She mailed her Petition on August 2, 2004, five days late. She filed her Petition on August 3, 2004, six days late. Therefore, her Petition is time-barred, and neither FCHR nor the Division has jurisdiction.

17. Florida Administrative Code Rule 28-106.204 states, in relevant part, that "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." Petitioner's Petition for Relief was date-stamped received by FCHR on August 3, 2004, and under Florida Administrative Code Rule 28-106.104, the Petition was deemed "filed" with FCHR on that date, which is 36 days after FCHR mailed its Notice to her.

18. Section 120.569(2)(a), Florida Statutes, provides in relevant part, that "[a] petition shall be dismissed if it is not in substantial compliance with these requirements or it has been untimely filed." The Petition in the instant case was not timely filed.

19. Based on the foregoing, the Petition for Relief herein is time-barred and should be dismissed. Appellate courts have upheld dismissals for tardiness as minimal as one day past the filing deadline. See Whiting v. Fla. Dept. of Law Enforcement, 849 So. 2d 1149 (Fla. 5th DCA 2003)(dismissal of employee's administrative appeal from notice of final agency action upheld where appeal was filed one day late.); Cann v. Dept. of Children and Family Services, 813 So. 2d 237 (Fla. 2nd DCA 2002) (request for administrative hearing untimely filed where request filed one day late with the Department). Likewise, the administrative forum has not hesitated to dismiss time-barred Petitions in employment discrimination cases. See Clardy v. Dept. of Corrections, DOAH Case No. 04-1020 (RO: May 6, 2004) (Petition for Relief dismissed where petition untimely filed with FCHR three days late); Perdraza v. Int'l Brotherhood Local 2008, DOAH Case No. 02-0238 (RO: June 21, 2002) (Petition for Relief time-barred where petition filed four days late with FCHR); Perry v. Speedway Superamerica, LLC, d/b/a Starvin' Marvin, DOAH Case No. 02-1624 (RO: June 18, 2002) (Petition for Relief time-barred where petition filed with FCHR two days late); Oliveras v. Aero Decal, DOAH Case No. 01-3928 (RO: November 28, 2001), (Petition for Relief time-barred where petition filed with FCHR one day late).



20. The Rule and the Commission's Notice of Determination No Cause are clear, but based on the "Instructions for Filing a Petition for Relief," Petitioner claims she was confused between the 30 days' filing period for a Petition for Relief from a discriminatory housing practice and the 35 days' filing period for a Petition for Relief from a discriminatory employment practice. The Instructions for Filing a Petition for Relief document (see Findings of Facts 5-6) states that for employment and public accommodations complaints, the petition for relief must be received by the FCHR no later than 35 days after the date of determination. However, this document also clearly states that "[f]or Housing cases, it [the Petition] must be received by the Commission no later than 30 days after you receive a notice that the Commission has concluded its investigation." (Emphasis as it appears in the exhibit). This document goes on to further state that the Commission will date-stamp the Petition upon receipt. Finally, this document states that "[t]his form must be received by the Commission on or before the close of business on the 30th or 35th day, depending on your case type."

21. Furthermore, the Petition form indicated that it was a Petition for Relief from a "housing discriminatory practice." By checking this category on the cover page of her Petition for Relief form, and not checking on her Petition for Relief form

that her Petition pertained to an unlawful employment practice or a public accommodation discriminatory practice, which categories also were provided as choices on this form, it is clear that Petitioner understood that she was filing a Petition for Relief from a housing discriminatory practice (limited by 30 days) and was not confused in thinking that she was dealing with the time frame (limited by 35 days) for an unlawful employment practice or a public accommodation discriminatory practice. Even so, she did not file within 35 days; she filed on the thirty-sixth day.

22. Petitioner does not actually claim that FCHR's Transmittal of Petition misled her. If that had been the case, Petitioner's reliance on FCHR's erroneous language therein, referring to a petition for relief from an unlawful employment practice (see Findings of Fact 11-12), still would be neither reasonable nor proven. The Transmittal of Petition originated with the FCHR Clerk and was directed to the Division of Administrative Hearings, not to the Petitioner, although Petitioner received a copy. Further, this Transmittal of Petition also indicated that FCHR had received Petitioner's Request for Relief (the Petition which was received on August 3, 2004) and was requesting that the Division assign the matter to an Administrative Law Judge for further proceedings. Therefore,

Petitioner could only have received this Transmittal of Petition after she had already mailed her Petition for Relief to FCHR.

23. Florida Administrative Code Rule 28-106.103, does not offer Petitioner any relief. That Rule expressly excepts additional time being added to the type of notice provided in this case, which was FCHR's Notice of Determination. (See Findings of Fact 3-4.) Such a Notice of Determination is a "notice of agency decision" as provided for under Florida Administrative Code Rule 28-106.111, which does, or may, determine a party's substantial interest. Florida Administrative Code Rule 28-106.103 provides, in relevant part, that: "No additional time shall be added . . . when the period of time begins pursuant to a type of notice described in Rule 28-106.111." Finally, even if five additional days were added to the June 28, 2004, due date for the filing of Petitioner's Petition for Relief, her Petition would have been due at FCHR by August 2, 2004, and it was not received by FCHR until August 3, 2004, one day late.

24. In some instances, courts have examined whether the doctrine of equitable tolling could be applied to extend an administrative time limit. In Machules v. Dept. of Administration, 523 So. 2d 1132 (Fla. 1988), the Florida Supreme Court stated:

Generally, the tolling doctrine had been

applied when the plaintiff has been misled or lulled into inaction, has in some extraordinary way been prevented from asserting his rights, or has timely asserted his rights mistakenly in the wrong forum.

523 So. at 1134. In Cann v. Dept. of Children and Family Services, 813 So. 2d 237 (Fla. 2nd DCA 2002), the Department of Family Services issued the Appellants, the Canns, a notice of intent to dismiss their request for an administrative hearing because it was filed untimely, as it was filed with the Department one day late. The facts indicated that the Canns' attorney had prepared and delivered their request to the post office two days before it was due, but the Department did not receive the request until one day past the deadline. The Second District Court of Appeal applied the Supreme Court's requirement for equitable tolling as espoused in Machules and concluded that the requirements for equitable tolling were not met in the Cann case. The Court upheld the Department's dismissal of the Canns' untimely request for administrative hearing. See also Whiting v. Florida Department of Law Enforcement, 849 So. 2d 1149 (Fla. 1st DCA 2003) (notice of appeal from final agency action filed one day late was insufficient to support claim of equitable tolling and agency's dismissal of untimely notice upheld).

25. In the instant case, Petitioner has filed a Petition for Relief with FCHR six days after the July 28, 2004, deadline. FCHR's Notice was proper and Petitioner knew the proper forum.

Under Machules and Cann, Petitioner's assertions as to why she failed to timely file her Petition for Relief are insufficient to support equitable tolling.

26. Although Petitioner has asserted that her physical disabilities prevented her filing timely, she has presented neither evidence to that effect, nor case law to support such a position, so there is nothing extraordinary in Petitioner's failure to timely file her Petition in this case.

27. The Petition for Relief must be dismissed.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Petition herein.

DONE AND ENTERED this 18th day of January, 2005, in Tallahassee, Leon County, Florida.



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ELLA JANE P. DAVIS  
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Division of Administrative Hearings  
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Filed with the Clerk of the  
Division of Administrative Hearings  
this 18th day of January, 2005.

ENDNOTES

<sup>1/</sup> During the telephonic conference call, Petitioner disputed none of the facts as alleged in the Motion to Dismiss. Specifically, Petitioner stated that she had no reason to doubt FCHR's date stamp and had no proof that her Petition had arrived at the Commission on any other date than August 3, 2004. She stated that she had mailed her Petition to the Commission on August 2, 2004, and that she had proof of that mailing date. She further asserted that she had not requested an extension in which to file her Petition and that FCHR did not enter an order extending the time during which she could file her Petition. However, she also represented that her yellow copy of FCHR's June 28, 2004, instructions/correspondence, stated she had 35 days to "respond."

<sup>2/</sup> This document bears FCHR's certificate of filing and service showing the date of June 28, 2003. This "2003" date seems to be a clerical error resulting from FCHR's use of a pre-printed form, because the signature of FCHR's Executive Director on the same document was dated by hand on April 23, 2004, and Petitioner conceded receiving the Determination in 2004. Therefore, the date of service and filing of the Determination of No Reasonable Cause is found to be June 28, 2004.

<sup>3/</sup> The certificate of transmittal on this document is actually dated August 10, 2002, but the "2002" apparently is yet another clerical error resulting from FCHR's use of a pre-printed form, because the transmittal was date-stamped as received by the Division on August 11, 2004. Therefore, it is found that the Petition was transmitted by FCHR to the Division on August 10, 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.