

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

KELVIN D. BODLEY,)
)
 Petitioner,)
)
 vs.) Case No. 04-3071
)
 ORANGE COUNTY, FLORIDA CODE)
 ENFORCEMENT DIVISION,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the administrative hearing of this case on October 26, 2004, in Orlando, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: Kelvin D. Bodley, pro se
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For Respondent: Susan T. Spradley, Esquire
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STATEMENT OF THE ISSUES

The issues for determination are whether the Florida Commission on Human Relations (Commission or FCHR) lacks jurisdiction under Chapter 760, Florida Statutes (2003), over

the claims in the Charge of Discrimination because the claims are barred by the doctrines of collateral estoppel and res judicata; the claims are time-barred by Subsections 760.01(1) and (5), Florida Statutes (2003); or both.

PRELIMINARY STATEMENT

On April 7, 2004, Petitioner filed a Charge of Discrimination with the Commission alleging that Respondent discriminated and retaliated against Petitioner. On July 28, 2004, the Commission issued a Determination: No Jurisdiction, finding that the Commission did not have jurisdiction over the claims set forth in the Charge of Discrimination.

On August 30, 2004, Petitioner timely filed a Petition for Relief, by which Petitioner requested an administrative hearing to challenge the determination that the Commission lacked jurisdiction over the Charge of Discrimination. On August 31, 2004, the Commission referred the matter to DOAH to conduct the hearing.

At the hearing, Petitioner testified, called no other witnesses, and submitted 59 exhibits for admission into evidence. In addition, Respondent and Petitioner submitted 19 joint exhibits for admission into evidence. Respondent called no witnesses. The identity of the exhibits, and the rulings regarding each, are set forth in the Transcript of the

administrative hearing that was filed with DOAH on December 27, 2004.

Respondent timely filed a Proposed Recommended Order (PRO) on January 6, 2005. Petitioner did not file a PRO.

FINDINGS OF FACT

1. Respondent employed Petitioner in Respondent's Code Enforcement Division as a Program Coordinator from sometime in November 1999, until Petitioner resigned his employment on June 13, 2003. On April 2, 2002, while Petitioner was employed with Respondent, Petitioner filed identical charges of discrimination simultaneously with the Commission and the United States Equal Employment Opportunity Commission (EEOC). The charges alleged that Petitioner's employer discriminated against Petitioner on the basis of his race through disparate treatment in pay and promotion, retaliated against Petitioner, and created a hostile work environment for Petitioner.

2. The EEOC assigned case number 150A201984 to the charge of discrimination. On April 29, 2002, the EEOC issued a Dismissal and Notice of Rights.

3. On July 26, 2002, Petitioner filed a civil action in the United States District Court for the Middle District of Florida. The initial Complaint and subsequent Amended Complaint contained the same allegations as those set forth in the charges of discrimination filed with the Commission and the EEOC. The

complaints alleged that Petitioner's employer violated Title VII of the Civil Rights Act of 1991 and the Florida Civil Rights Act by discriminating against Petitioner on the basis of race, through disparate treatment in promotion and pay; by retaliating against Petitioner; and by creating a hostile work environment.

4. On February 12, 2004, Petitioner voluntarily dismissed his racial harassment claims in the federal civil case. On March 17, 2004, the federal court entered a Summary Judgment for the employer on all remaining claims and dismissed Petitioner's case with prejudice.

5. The Summary Judgment expressly includes allegations of discrimination through the date of Petitioner's resignation from Orange County on June 13, 2003. On or about June 10, 2004, Petitioner appealed the Summary Judgment to the United States Court of Appeals for the Eleventh Circuit. On September 30, 2004, the Eleventh Circuit affirmed the Summary Judgment.

6. On April 7, 2004, Petitioner filed the Charge of Discrimination over which the Commission determined it has no jurisdiction. The Charge of Discrimination alleges in its entirety:

I believe I have been discriminated against pursuant to Chapter 760 of the Florida Civil Rights Act, and/or Title VII of the Federal Civil Rights Act, and/or the Age Discrimination in Employment Act, and/or the Americans with Disabilities Act as applicable:

Once I filed a discrimination complaint (EEOC # 150A201984) I was retaliated against and subjected to disparate treatment because of my race (Black). Specifically, I was subjected to different terms and conditions, demoted and unfairly disciplined. Once I filed my complaint I was not invited to attend bi-weekly senior staff meetings and my job duties were diminished and reassigned to other staff. In addition, the entire Citizen Coordination Section which I supervised was eliminated and I was transferred to another Division in a position that had non-supervisory status. The position provided no opportunity for promotion and had minimal job duties. I was unjustifiably given a written reprimand for rude behavior and being absent without proper notification. After I grieved the reprimand it was reduced to an oral warning. One non-African American supervisor received numerous pay increases and unwarranted promotions. Eventually, he surpassed me in salary. Another non-African American supervisor was paid at a higher salary than myself, but did not qualify for the position and falsified the employment application. I filed a complaint with the Orange County Office of Professional Standards but they failed to conduct a fair and thorough investigation. Once I filed my complaint I was subjected to racial discrimination, retaliation and subjected to a hostile working environment from various members of County Administration which defamed my character and good name after working in County government for six years; thus purposely ruining my career to serve as a public servant in Orange County government. Ultimately, I was constructively discharged on June 13, 2003.

Joint Ex. 18.

7. The Commission investigated Petitioner's allegations in the Charge of Discrimination. The Commission provided Petitioner with an opportunity to explain how the allegations differed from the matters that the federal court disposed of in the Summary Judgment. Petitioner responded to the Commission in a timely manner.

8. On July 28, 2004, the Commission determined that it did not have jurisdiction over the claims in the Charge of Discrimination. In relevant part, the Commission specifically stated:

1. The Respondent is an employer within the meaning of one or more of the following laws: (a) the Florida Civil Rights Act of 1992, as amended, §760, Florida Statutes (2002); (b) Title VII of the Civil Rights Act of 1964, as amended; (c) the Age in Discrimination in Employment Act (ADEA); and/or (d) the Americans with Disabilities Act (ADA), however, all jurisdictional requirements for coverage have not been met.

2. Federal case law interpreting Title VII is applicable to cases arising under the Florida Civil Rights Act because the Florida act was patterned after the federal civil rights laws. Florida State University v. Sondel, 685 So. 2d 923, 925 (Fla. 1st DCA 1996).

3. On or about May 17, 2004, the Middle District of Florida, Orlando Division, decided the Complainant's claims against Respondent for discrimination and retaliation on summary judgment and dismissed all claims with prejudice. The failure to promote claim was dismissed for failure to exhaust administrative remedies.

Complainant's complaint consists of substantially the same claims decided by the civil court.

4. A dismissal of claims with prejudice is a final order. See Kobluer v. Group Hospitalization and Medical Services, Inc., 954 F. 2d 705 (11th Cir. 1992). As such, the appellate court has jurisdiction to decide such issues. Id. See also Solar v. Merit Systems Protection Bd., 600 F. Supp. 535 (D.C. Fla. 1985). The Commission does not have the authority to re-investigate and re-decide issues that were decided by the civil court, even if the reason for dismissal was failure to exhaust administrative remedies. See DOAH Docket Sheet filed 9-1-04.

9. The Charge of Discrimination and Petition for Relief in this proceeding do not allege any acts or violations that were not raised in, and ruled on, by the federal court in prior litigation. Several of the allegations refer to matters that occurred more than 365 days before the filing of the Charge of Discrimination on April 7, 2004, including allegations contained in the charges of discrimination that Petitioner filed simultaneously with the Commission and EEOC on April 1, 2002. Other allegations of discrimination, hostile work environment, and retaliation through June 13, 2003, when Petitioner resigned from his employment with Respondent, are included in the Amended Complaint filed in federal court.

10. It is undisputed that the allegations in this proceeding concerning demotion and transfer to a non-supervisory

position refer to a transfer to Respondent's Neighborhood Services Division on June 16, 2003. The Summary Judgment expressly states that the Neighborhood Services Division "transfer has also become a part of this suit." The Summary Judgment notes that the transfer to the Neighborhood Services Division is an incident of retaliation alleged by the employee and ruled that the transfer was not retaliatory.

11. Petitioner included the transfer in his Initial Brief to the United States Court of Appeals for the Eleventh Circuit and also argued that the elimination of his duties, his exclusion from key meetings, and the closing of the Citizen Coordination Section that he had supervised all supported his retaliation claim. The order affirming the Summary Judgment considered the issue of the alleged retaliatory transfer, the elimination of Petitioner's job duties over time, and an allegedly unwarranted written reprimand, and determined there was no retaliation.

12. The Charge of Discrimination in this proceeding alleges, in relevant part, that the elimination of the Citizen Coordination Section that Petitioner had supervised was discriminatory and/or retaliatory. The order affirming the Summary Judgment considered the issue of the elimination of Petitioner's job duties over time and did not find retaliation.

13. It is undisputed that the allegations in the Charge of Discrimination in this proceeding refer to a written reprimand issued by Petitioner's supervisor in March 2003. The written reprimand was part of the federal litigation, including the employee's Statement of Facts in Response to Orange County's Motion for Summary Judgment and in the employee's supporting exhibits. The order affirming the Summary Judgment specifically referred to the written reprimand and did not determine that the reprimand constituted retaliation. Moreover, neither DOAH nor the Commission has statutory authority to consider allegations concerning the written reprimand because those allegations involve acts that occurred more than one year before the filing of the Charge of Discrimination within the meaning of Subsection 760.11(1), Florida Statutes (2003).

14. It is undisputed that allegations in the Charge of Discrimination in this proceeding concerning disparate pay for two non-African American supervisors referred to higher pay for supervisors, identified in the record as Mr. Robert Hildreth and Mr. Ed Caneda, that occurred in March 2002. The federal civil court previously analyzed Petitioner's claims of pay disparity related to both supervisors. The court found that Petitioner was not similarly situated to either supervisor.

15. The Charge of Discrimination in this proceeding alleges that Respondent subjected Petitioner to a hostile

working environment when various members of the Orange County Administration defamed Petitioner's character and good name. Petitioner fully addressed the allegations of harassment and hostile work environment in his response to the motion for summary judgment in federal court. Petitioner stipulated to a dismissal with prejudice of his hostile work environment claims, and the federal court ruled that Orange County was the prevailing party on Petitioner's claims for hostile work environment.

16. It is undisputed that the Charge of Discrimination in this proceeding does not contain any allegations concerning the failure to promote Petitioner. However, Petitioner did raise this issue and litigated the issue in federal court.

17. The federal court ruled that Petitioner did not exhaust his administrative remedies concerning allegations that Respondent failed to promote Petitioner and that the claim arose in January 2002, prior to date when Petitioner filed simultaneous claims with the EEOC and FCHR. More than two years passed before Petitioner filed the Charge of Discrimination in this proceeding. Accordingly, Petitioner's claim of promotion discrimination falls outside the statutory one-year filing requirement prescribed in Subsection 760.11(1), Florida Statutes (2003). In any event, the claim that Respondent failed to

promote Petitioner is not a new issue that was beyond the scope of the Summary Judgment.

18. It is undisputed that allegations in the Charge of Discrimination in this proceeding concerning the alleged failure of Respondent's Office of Professional Standards (OPS) to conduct a fair and thorough investigation of his discrimination complaint referred to an investigation into Petitioner's complaint in March 2002. OPS issued its final report on July 3, 2002, approximately 21 months before Petitioner filed the Charge of Discrimination in this proceeding. Accordingly, the complaints about the OPS investigation fall outside the statutory one-year filing requirement set out in Subsection 760.11(1), Florida Statutes (2003).

19. The federal litigation included identical allegations concerning the OPS investigation. During the federal case, Petitioner's attorney deposed Mr. William Moore, the manager of OPS, and questioned Mr. Moore extensively about the way OPS investigated Petitioner's complaint. In response to the motion for summary judgment, Petitioner specifically claimed that the investigation undertaken by OPS was unfair and discriminatory. The complaint in the Charge of Discrimination in this proceeding is not a new issue or claim, but is identical to the issue litigated in federal court.

20. Allegations in the Charge of Discrimination that Respondent excluded Petitioner from key meetings refer to events in September 2001. The same allegations were litigated in federal court. Petitioner outlined his allegations to the federal court that allegedly showed his exclusion from key meetings. Petitioner also appealed the issue of exclusion to the appellate court. The Charge of Discrimination presents no new issue, and the issue falls outside the one-year filing requirement in Subsection 760.11(1), Florida Statutes (2003).

21. It is undisputed that the allegation in the Charge of Discrimination that Respondent constructively discharged Petitioner, refers to being demoted, reprimanded, excluded from meetings, and transferred to the Neighborhood Services Division. The allegation of constructive discharge is not a new claim, but is the same claim that was litigated in federal court.

CONCLUSIONS OF LAW

22. DOAH has jurisdiction to determine whether the Commission has jurisdiction in this proceeding. §§ 120.57(1) and 760.11(7), Florida Statutes (2003). DOAH has jurisdiction over the parties. DOAH provided the parties with adequate notice of the administrative proceeding.

23. At the hearing, the ALJ admitted all of the exhibits, with the exception of Petitioner's Exhibits numbered 1.57 and 1.58, into evidence for the limited purpose of determining if

the allegations raised in the Charge of Discrimination are new claims that were not before the federal court. The ALJ did not admit any exhibits to prove a specific allegations of discrimination.

24. The ALJ reserved ruling on Petitioner's Exhibits 1.57 and 1.58 for disposition in this Recommended Order. The objections to the admissibility of Petitioner's Exhibits 1.57 and 1.58 are sustained. Each of the exhibits relates to claims filed by other employees or former employees of Respondent. Each is dated June 29, 2004, more than one year after Petitioner resigned his employment with Orange County and almost three months after the date of the Charge of Discrimination in this proceeding. Each is offered solely to show bad character or propensity on the part of Respondent to retaliate against other employees.

25. The burden of proof is generally on the party asserting the affirmative of the issue. Department of Transportation v. J.W.C. Company, Inc., 396 So. 2d 778 (Fla 1st DCA 1981); Balino v. Department of Health and Rehabilitative Services, 348 So. 2d 349 (Fla 1st DCA 1977), cert. denied, 370 So. 2d 458 (Fla. 1979). Petitioner must show that the Charge of Discrimination in this proceeding raises new claims that were not litigated in federal court. For reasons stated in the Findings of Fact, Petitioner has not met his burden of proof.

26. The doctrine of collateral estoppel bars Petitioner's claims. Collateral estoppel is a judicial doctrine that prevents identical parties from re-litigating issues that have already been decided. The doctrine of collateral estoppel applies to administrative proceedings. Hays v. State of Florida, Department of Business Regulations, Division of Pari-Mutual Wagering, 418 So. 2d 331 (Fla. 3d DCA 1982). The purpose of collateral estoppel is to bring finality to disputes.

27. The parties and issues in this proceeding are identical to those litigated in federal court. The issues in this proceeding were fully litigated and determined in a contest that resulted in a final decision by the federal courts. Department of Health and Rehabilitative Services v. B.J.M., 656 So. 2d 906 (Fla. 1995); Mobil Oil Corp. v. Shevin, 354 So. 2d 372 (Fla. 1977).

28. The dismissal with prejudice of Petitioner's discrimination and retaliation claims on summary judgment was a final order by a federal court of competent jurisdiction. See, e.g., Kobluer v. Group Hospitalization and Medical Services, Inc., 954 F.2d 705, 708 (11th Cir. 1992) (district court's dismissal of a case for failure to exhaust administrative remedies is a final order). Petitioner can not now re-litigate the same claims through the state administrative process.

29. The doctrine of res judicata also precludes Petitioner from using the administrative process to revisit the same claim between the same parties on the same cause of action. See Bertone v. Winn-Dixie Stores, Inc., 1997 Fla. Div. Adm. Hear. LEXIS 5695 (Recommended Order Dec. 11, 1997) (federal case filed for sexual harassment and retaliation barred petitioner from bringing separate state administrative proceeding for same claim). Even if Petitioner were to raise an issue in the administrative proceeding that was not addressed in federal court, the doctrine of res judicata precludes Petitioner from raising such an issue if the issue were known to Petitioner and could have been raised during the federal litigation. See Florida Department of Transportation v. Juliano, 801 So. 2d 101, 105 (Fla. 2001). The final judgment of the federal court on the merits of the same cause of action between the same parties is conclusive as to every matter that might have been litigated and determined in that action. See State of Florida v. McBride, 848 So. 2d 287, 290 (Fla. 2003).

30. Subsection 760.11(1), Florida Statutes (2003), requires Petitioner to file the Charge of Discrimination in this proceeding within 365 days of the alleged violation. Subsection 760.11(1) is a statute of limitations. See Greene v. Seminole Electric Coop., Inc., 701 So. 2d 646, 648 (Fla. 5th DCA 1997). New claims of discrimination or retaliation, if any,

that occurred more than 365 days prior to the date that Petitioner filed the Charge of Discrimination in this proceeding are time-barred under Subsection 760.11(1), Florida Statutes (2003).

31. The Commission did not retain jurisdiction over the first charge of discrimination during the federal litigation. When Petitioner filed his civil complaint with the federal district court on July 26, 2002, it divested the Commission of jurisdiction over all related matters. See Sweeny v. Florida Power and Light Co., 725 So. 2d 380 (Fla. 3d DCA 1998) (civil complaint divested Commission of jurisdiction).

32. The Commission's jurisdiction over the first charge of discrimination was not tolled during the federal lawsuit. See, e.g., Farancz v. St. Mary's Hospital, Inc., 585 So. 2d 1151, 1152 (Fla. 4th DCA 1991) and Ross v. Jim Adams Ford, Inc., 871 So. 2d 312, 313 (Fla. 2d DCA 2004) (administrative process under Chapter 760 does not toll the limitations period). Rather, the Commission correctly determined that it does not have jurisdiction over the subject matter of this proceeding.

33. Respondent is not entitled to recover attorney's fees and costs pursuant to Subsection 760.11(7), Florida Statutes (2003). The cases cited by Respondent involve litigation on the merits of alleged discrimination rather than a determination of jurisdiction. Even if Respondent were entitled to fees and

costs, Respondent did not submit evidence of the amount of fees to which it is entitled or the reasonableness of the claimed amount. Moreover, Petitioner had no opportunity during the hearing to refute Respondent's claim, the amount of fees and costs, or the reasonableness of that amount.

RECOMMENDATION

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

RECOMMENDED that the Commission enter a Final Order dismissing this proceeding for the reasons stated in this Recommended Order.

DONE AND ENTERED this 25th day of January, 2005, in Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
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this 25th day of January, 2005.

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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.