

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

KAREN HOWE, PERSONAL
REPRESENTATIVE OF THE ESTATE OF
STEPHEN HOWE,

Petitioner,

EEOC Case No. 15DA300754

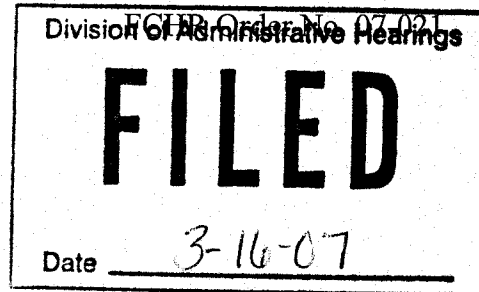
FCHR Case No. 23-02170

DOAH Case No. 04-3236

v.

WESTERN AND SOUTHERN FINANCIAL
GROUP,

Respondent.



**ORDER REMANDING PETITION FOR
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE
FOR FURTHER DETERMINATION OF AFFIRMATIVE RELIEF**

This matter is before the Commission for consideration of the Order On Remand, dated January 3, 2007, issued in the above-styled matter by Administrative Law Judge Don W. Davis.

Statement of the Case

The Complainant in this matter, Stephen Howe, filed a complaint with the Commission in May of 2003, prior to his death, alleging that Respondent had unlawfully terminated him from his position as an Insurance Agent on the basis of his disability. Upon completion of its investigation, the Commission issued a "no cause" determination, and the Personal Representative of the Complainant's estate filed a Petition for Relief, which was transmitted by the Commission to the Division of Administrative Hearings on September 13, 2004.

On January 19, 2005, Judge Davis issued an "Order Closing File" in this matter, indicating that Petitioner's representative had failed to respond to an Order to Show Cause directing Petitioner's representative to show cause in writing that a factual and legal basis existed for the continued maintenance of this proceeding.

The Commission subsequently issued an "Order Remanding Petition for Relief from an Unlawful Employment Practice," dated March 8, 2005, in which it found that Petitioner's representative had timely filed a response to the Order to Show Cause, but had mistakenly filed the response in the wrong forum, with the Commission, instead of with the Division of Administrative Hearings, and that therefore the doctrine of equitable tolling applied and further proceedings on the Petition for Relief should be conducted.

Judge Davis then issued an "Order Declining Remand," dated March 15, 2005, indicating that "re-opening the case would be a nullity in view of the Florida Supreme Court's recent

decision in Knowles v. Beverly Enterprises-Florida, Inc., --- So. 2d ----, 2004 WL 2922097 (Fla. 2004)...” Judge Davis concluded, “Knowles basically holds that claims for violation of statutory rights die with the claimant except in those instances where the alleged violation resulted in the claimant’s death.”

The Commission issued an “Order Remanding Petition for Relief from an Unlawful Employment Practice,” dated April 20, 2005, in which it concluded, “[i]n our view, Knowles, supra, has nothing to do with the enforcement of statutory rights established by the Florida Civil Rights Act of 1992,” and in which it stated, “[w]e conclude that Complainant’s cause of action under the Florida Civil Rights Act of 1992 did not die with the person and that it may be commenced and prosecuted by Complainant’s personal representative, as set out in Section 46.021, Florida Statutes (2003).”

On remand, Judge Davis issued a Recommended Order, dated November 16, 2005, in which he restated that based on Knowles, supra, the Division of Administrative Hearings did not have jurisdiction of the matter since Petitioner is deceased. However, notwithstanding Judge Davis’ position regarding jurisdiction, the Recommended Order also dealt with the merits of Petitioner’s claim, and Judge Davis found that discrimination had occurred and made findings as to the appropriate remedy in the matter.

The Commission then issued a “Final Order Awarding Affirmative Relief from an Unlawful Employment Practice,” dated March 16, 2006, adopting the Recommended Order’s findings of fact, adopting the Recommended Order’s conclusions of law except the conclusion that the Commission and the Division of Administrative Hearings do not have jurisdiction of the matter, and setting out the following remedy provisions:

“Respondent is hereby ORDERED:

(1) to cease and desist from discriminating further in the manner it has been found to have unlawfully discriminated against Petitioner;

(2) to remit back pay to Petitioner in the amount of \$17,523.78 in the manner recommended by the Administrative Law Judge in the Recommended Order;

(3) to pay Petitioner the statutorily established interest on the amounts awarded Petitioner in (2), above;

(4) to pay Petitioner lost benefits in the manner recommended by the Administrative Law Judge in the Recommended Order from the time of Petitioner’s termination until the time of Petitioner’s death;

(5) to pay Petitioner attorney’s fees that have been reasonably incurred in this matter by Petitioner; and

(6) to pay Petitioner the amount of costs that has been reasonably incurred in this matter by Petitioner.

The Commission reserves jurisdiction over the determination of precise remedy in this matter, including, but not limited to, amounts of back pay, interest, benefits, attorney’s fees, and costs awarded Petitioner.

If, within 30 days of the date of the filing of this Order by the Clerk of the Commission, the parties have agreed to the appropriate remedy amounts for the unlawful employment practice found to have occurred, the parties shall prepare and submit to the Commission a Joint Stipulation of Settlement.

If, within 30 days of the date of the filing of this Order by the Clerk of the Commission, the parties are unable to reach agreement as to the remedy amounts for the unlawful employment practice found to have occurred, the Petitioner is directed to file with the Commission a Notice of Failure of Settlement, and the case will be remanded to the Administrative Law Judge for determination of the appropriate remedy amounts in this matter, as ordered above.

The Commission shall offer its mediation services to the parties to facilitate settlement within the specified 30-day period.”

Respondent appealed this order to the District Court of Appeal, First District, and Petitioner filed with the Commission “Petitioner’s Notice of Failure of Settle,” and the Commission remanded the matter to the Administrative Law Judge as set out in the remedy provisions, above.

In an Opinion dated, July 13, 2006, the District Court of Appeal, First District, dismissed the appeal, concluding that the order on appeal was not a final order. In so doing the Court stated, “Specifically, because the Commission on Human Relations reserved jurisdiction over the precise remedy in this case, it appears that the administrative adjudicatory process has not yet been concluded [citation omitted]. Moreover, the Commission’s anticipation of the filing of either a Joint Stipulation of Settlement or a Notice of Failure of Settlement following settlement negotiations indicates the agency’s continued involvement in the matter. Accordingly, the order is not final and this Court lacks jurisdiction to review the order on appeal [citation omitted].”

Judge Davis resumed proceedings in the matter and, in an “Order Requiring Parties’ Response,” dated August 14, 2006, Judge Davis noted that the Commission’s March 16, 2006, Order “apparently fails to constitute a final order in that it does not address the amount of attorney’s fees and costs reasonably incurred in this matter by Petitioner.” In a subsequent order, Judge Davis directed counsel for the parties to file a stipulated fee statement regarding fees and costs to be recommended for award to Petitioner’s counsel by the Commission.

The parties complied with this directive, and based thereon, in the “Order On Remand” currently before the Commission, dated January 3, 2007, Judge Davis stated, “Accordingly, it is recommended that FCHR proceed with issuance of a final order that references no contingencies or retained jurisdiction for resolution of issues by the parties, and includes an award of attorney’s fees and costs to counsel for Petitioner in the amount of \$30,686.25 in attorney’s fees and \$2,284.43 in costs, payable to Dan Stewart, P.A.”

In our view, the record is not yet developed to the point where the Commission can issue a final order “that references no contingencies or retained jurisdiction.” A review of the Commission’s March 16, 2006, “Final Order Awarding Affirmative Relief from an Unlawful Employment Practice,” reflects that the Commission not only awarded attorney’s fees and costs

to Petitioner, but also ordered Respondent "to pay Petitioner's lost benefits in the manner recommended by the Administrative Law Judge in the Recommended Order from the time of Petitioner's termination until the time of Petitioner's death," as well as interest on the back pay amount recommended by the Administrative Law Judge. The "Petitioner's Notice of Failure to Settle" does not suggest that settlement was reached on these amounts but not on attorney's fees and costs. Nor does the record before the Commission reflect fact finding on these amounts by the Administrative Law Judge. Consequently, in order to issue a "final order" specifically setting out all amounts owed Petitioner further fact finding would be required as to the amount of lost benefits owed Petitioner and the amount of interest owed on the back pay award recommended by the Administrative Law Judge.

Exceptions

Neither party filed exceptions to the Administrative Law Judge's Order On Remand.

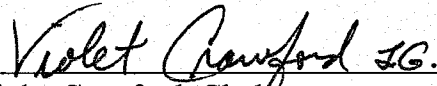
Remand

The Petition for Relief and Complaint of Discrimination are REMANDED to the Administrative Law Judge for the issuance of a Recommended Order containing the precise amounts owed Petitioner over which the Commission retained jurisdiction in its March 16, 2006, "Final Order Awarding Affirmative Relief from an Unlawful Employment Practice," namely, attorney's fees, costs, lost benefits, and interest on the back pay amount awarded.

DONE AND ORDERED this 14 th day of March, 2007.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Gilbert M. Singer, Panel Chairperson;
Commissioner Gayle Cannon; and
Commissioner Billy Whitefox Stall

Filed this 14 th day of March, 2007,
in Tallahassee, Florida.



Violet Crawford, Clerk
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Don W. Davis, 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 14th day of March, 2007.

By: Violet Crawford J.C.
Clerk of the Commission
Florida Commission on Human Relations