

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

JIMMY D. FOREHAND,

EEOC Case No. 15DA401191

Petitioner,

FCHR Case No. 2004-22990

v.

DOAH Case No. 05-0976

DEPARTMENT OF MANAGEMENT
SERVICES,

FCHR Order No. 06-104

Respondent.

2006 DEC - 5 A 11:13
FILED
DIVISION OF
ADMINISTRATIVE
HEARINGS

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

Preliminary Matters

Petitioner, JIMMY D. FOREHAND, filed a complaint of discrimination on August 31, 2004, pursuant to the Florida Civil Rights Act, alleging that the Respondent discriminated against him in employment on the basis of disability, age and retaliation.

The Commission determined that there was no reasonable cause to believe that unlawful discrimination occurred and on February 23, 2005, the Executive Director issued his Determination: No Cause. Petitioner timely filed a Petition for Relief and the case was transmitted to the Division of Administrative Hearings to conduct a formal proceeding.

The hearing was held on December 5-6, 2005, January 31-February 2, 2006, March 3, 2006, March 13, 2006, and March 31, 2006, in Tallahassee, Florida, before Administrative Law Judge P. Michael Ruff. The ALJ's Recommended Order was issued on August 29, 2006.

The Commission panel designated below conducted a telephonic hearing on November 2, 2006, considered the record of this matter and determined the action to be taken on the Recommended Order.

Findings of Fact and Conclusions of Law

The ALJ found that Petitioner was employed by the Respondent agency, or its predecessor, from January 21, 1977, to June 30, 2004. For the last 19 years of his employment he was classed as an electrician. Petitioner had several instances in which he required Workers' Compensation assistance during his years of service--one, in 1992, when he was diagnosed with asbestosis and another in 1999 when he sprained his left knee on the job. Both were treated and the doctor returned him to work with a temporary light duty assignment. Whenever the doctor ordered or the Petitioner requested, the Respondent attempted to find light duty work and make it available. Several times such work was not available and the Petitioner would take leave. Throughout Petitioner's tenure as an employee, or at least since his initial diagnosis of

asbestosis, the Respondent has allowed Petitioner to work at his own pace, without any regard to any time limit for performing his duties, without prohibition on his taking frequent rest breaks, and with tolerance for his late arrival at work, if tardiness was related to his physical condition.

The ALJ also found that the Department had been under significant executive and legislative pressure to reduce its workforce since 2000. When the 2001 legislature eliminated Petitioner's position, the Department was able to reclassify another position and place him in it. However, when the 2004 legislature eliminated Petitioner's position, the Department had no ability to reclassify any other position and, thus, he was unable to continue his employment past the end of fiscal year 2003-04.

As the ALJ's findings of fact indicate, the Petitioner failed to prove that any unlawful employment practice occurred. The ALJ specifically concluded that there was no direct evidence of discriminatory intent; in fact, the one statement relied upon by the Petitioner, "you can't save him this time," was neutral, referred to an earlier situation and does not denote discriminatory and direct evidence of discrimination. Further no statistical evidence, of any substantial nature, was presented by Petitioner and he failed to establish rebuttal/pretextual proof of discrimination by circumstantial evidence.

The ALJ further found that the Petitioner failed to establish a prima facie case for an action based on disability in that he failed to establish that he has any impairment that substantially limits one or more of his life activities, nor did he establish that the Respondent had any knowledge of such a disability, or that the Respondent failed to respond to any request for accommodation. In any case, the Respondent offered a legitimate, non-discriminatory reason for termination which the Petitioner failed to show was pretextual.

The ALJ also found that there was no evidence that the Respondent discriminated against the Petitioner based on age; as there was no showing that Petitioner was replaced by a younger worker. In any case, the Respondent offered a legitimate, non-discriminatory reason for termination which the Petitioner failed to show was pretextual.

The ALJ finally found that the Petitioner failed to establish any claim of retaliation. He failed to prove that he made a valid complaint under the Whistleblower's Act, nor did he assert any right pursuant § 760.10(7), FS, prior to the commencement of the Legislative Session at which his position was terminated. "Consequently, no competent, persuasive evidence of any retaliation on the basis of the Petitioner making such complaints, for the above reasons, has been established."

We adopt the Administrative Law Judge's findings of fact and his conclusion that a final order should be entered dismissing the case.

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order of Dismissal in a document entitled, "Exceptions to P. Michael Ruff's Recommended Order" filed on September 13, 2006.

The exceptions consist of 10 handwritten pages generally arguing that Petitioner failed to receive a proper investigation by the Florida Commission on Human Relations ("FCHR"); that FCHR had a conflict of interest in that its Executive Director had been previously employed by DMS and further failed to receive a fair hearing at the Division of Administrative Hearings

("DOAH"). In addition, the Petitioner challenged the ALJ's finding that the statement that "you can't save him this time" was not direct evidence of discriminatory intent (see discussion under and also attached a marked-up copy of the 49-page Recommended Order with his handwritten exceptions noted on each relevant page.

Generally, the numerous exceptions relate to the facts found by the ALJ and his conclusions as to credibility, the weight given to various statements and witnesses, and inferences drawn from the facts presented during the hearing. The Commission may overturn an Administrative Law Judge's finding of fact, **only if, after reviewing the complete record of the case, the Commission determines that the finding is not supported by competent substantial evidence in the record** or that the proceeding leading to the determination did not comply with the essential requirements of law. See Ausbon Brown v. Agency for Health Care Administration, FCHR 02-026 (FCHR 2002); Florida Department of Community Affairs v. Bryant, 586 So2d 1205, at 1210 (Fla. 1st DCA 1991). See also, Department of Health and Rehabilitative Services v. Yhap, 680 So2d 559 (Fla. 1st DCA 1996); Southpointe Pharmacy v. Department of Health and Rehabilitative Services, 596 So2d 106 (Fla. 1st DCA 1992); Clay County Sheriff's Office v. Loos, 570 So2d 394 (Fla. 1st DCA 1990); National Industries, Inc. v. Commission on Human Relations, 527 So2d 894 (Fla. 5th DCA 1988); Howard Johnson Co. v. Kilpatrick, 501 So2d 59 (Fla. 1st DCA 1987); Holmes v. Turlington, 480 So2d 150 (Fla. 1st DCA 1985); Brevard County Sheriff v. Florida Commission on Human Relations, 429 So2d 1235 (Fla. 5th DCA 1983); and School Board of Leon County v. Hargis, 400 So2d 103 (Fla. 1st DCA 1981).

The findings and conclusions based on those findings made by the ALJ are supported by competent, substantial evidence in the record. The allegations of conflict of interest by FCHR and failure of due process at DOAH based on the uncorroborated assertions of the Petitioner are not supported by any competent, credible, or substantial evidence. Therefore, the Petitioner's exceptions are rejected.

Dismissal

The Recommended Order is adopted and 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 of appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure 9.110.

DONE AND ORDERED this 4th day of December, 2006.

FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Rita B. Craig, Panel Chairperson;
Commissioner Donna Elam; and
Commissioner Shahrukh S. Dhanji

Filed this 4th day of December, 2006,
in Tallahassee, Florida.



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P. Michael Ruff, Administrative Law Judge, DOAH

Jim Tait, Legal Advisor for Commission Panel

I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 4th day of December, 2006.

By:



Clerk of the Commission
Florida Commission on Human Relations