STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

GABE KAIMOWITZ,

Petitioner,

v.

THREE RIVERS LEGAL SERVICES,

Respondent.
_____/

EEOC Case No. NONE
FCHR Case No. 2004-20032
DOAH Case No. 05-2972
FCHR Order No. 06-077

GABE KAIMOWITZ,

Petitioner,

v.

THREE RIVERS LEGAL SERVICES,

Respondent.
_____/

EEOC Case No. NONE
FCHR Case No. 2004-23165
DOAH Case No. 05-2170
FCHR Order No. 06-077

FINAL ORDER DISMISSING PETITIONS FOR RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE AND RULING ON PENDING MOTIONS

Preliminary Matters

Petitioner Gabe Kaimowitz filed complaints of discrimination in the two above-styled cases pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes.

The complaint filed in FCHR case number 2004-20032 alleged that Respondent Three Rivers Legal Services committed unlawful employment practices by denying Petitioner employment on the basis of Petitioner's age (DOB: 05-05-35) and disability (not specified in the complaint). The complaint also alleged that Respondent retaliated against Petitioner for having previously filed a discrimination complaint.

The complaint filed in FCHR case number 2004-23165 alleged that Respondent committed unlawful employment practices for not considering Petitioner's application for known vacancies on the basis of Petitioner's race (white), and on the basis of retaliation for having filed a previous complaint against Respondent.

The allegations set forth in the complaint in FCHR case number 2004-20032 were investigated, and on June 29, 2005, the Executive Director issued his determination finding that there was no reasonable cause to believe that an unlawful employment practice occurred. Petitioner subsequently filed a Petition for Relief from an Unlawful Employment Practice.

In FCHR case number 2004-23165, Petitioner was advised that 180-days had elapsed from the filing of the complaint without a determination having been issued, and Petitioner elected to file a Petition for Relief from an Unlawful Employment Practice.

Both Petitions for Relief were transmitted to the Division of Administrative Hearings for the conduct of a formal proceeding.

The Division of Administrative Hearings consolidated the cases, and an evidentiary hearing was held in Gainesville, Florida, on March 21 through 23, April 19 and 21, 2006, before Administrative Law Judge Harry L. Hooper.

Judge Hooper issued a Recommended Order of dismissal, dated June 1, 2006, recommending that the Commission dismiss both Petitions for Relief.

The Commission panel designated below considered the records of these matters and determined the action to be taken on the Recommended Order.

Findings of Fact

A transcript of the proceeding before the Administrative Law Judge was not filed with the Commission. In the absence of a transcript of the proceeding before the Administrative Law Judge, the Recommended Order is the only evidence for the Commission to consider. See National Industries, Inc. v. Commission on Human Relations, et al., 527 So. 2d 894, at 897, 898 (Fla. 5th DCA 1988). Accord, Phillips v. Martin Stables South, FCHR Order No. 06-053 (June 15, 2006), Beach-Gutierrez v. Bay Medical Center, FCHR Order No. 05-011 (January 19, 2005), and Waaser v. Streit's Motorsports, FCHR Order No. 04-157 (November 30, 2004).

We adopt the Administrative Law Judge's findings of fact.

Conclusions of Law

We find the Administrative Law Judge's application of the law to the facts to result in a correct disposition of the matter.

We note that the Administrative Law Judge concluded that "Class actions are not permitted in administrative proceedings pursuant to Chapter 120...and class standing in an administrative proceeding should not be inferred in the absence of a statute that provided that right." Recommended Order, ¶ 90. We note that the Commission's rules do provide that a Petition for Relief may contain "class" allegations. See Fla. Admin. Code R. 60Y-5.008(4). However, in the absence of a transcript of the proceeding before the Administrative Law Judge there is no basis to conclude that the Administrative Law Judge committed error in dealing with Petitioner's "class" allegations, especially given

Petitioner's representation in the Petitions for Relief that he would move at the "appropriate time" for certification of the classes described therein.

With this comment, we adopt the Administrative Law Judge's conclusions of law.

Exceptions

Neither of the parties filed exceptions to the Administrative Law Judge's Recommended Order.

The Commission's file contains two motions filed by Petitioner subsequent to the issuance of the Recommended Order: a motion filed with the Division of Administrative Hearings, a copy of which was received by the Commission on June 6, 2006, entitled, "Petitioner's Motion to Set Aside a Recommended Order Entered by Judge Harry L. Hooper Who Declared Erroneously Therein that 'No Transcript was Ordered;'" and a motion filed with the Commission on July 5, 2006, entitled, "Motion to Remand to the Division of Administrative Hearings for Recommendation by an Impartial Hearing Officer After Consideration of Transcripts Previously Ordered."

The Commission's file also contains one motion filed by Respondent subsequent to the issuance of the Recommended Order, entitled, "Respondent's Motion for Award of Attorney's Fees and Costs," received by the Commission on June 16, 2006.

We note that in administrative proceedings it is within the discretion of the presiding officer to conduct proceedings as are deemed necessary to dispose of issues raised by motions. See Fla. Admin. Code R. 28-106.204(1).

Neither party requested oral argument on their respective motions, and, as is our discretion, we conclude that no further proceedings are necessary to dispose of the motions pending. We have ruled on these motions in this Order, below.

Petitioner's "Motion to Remand to the Division of Administrative Hearings For Recommendation by an Impartial Hearing Officer After Consideration of Transcripts Previously Ordered"

Petitioner filed with the Commission, on July 5, 2006, a motion entitled, "Motion to Remand to the Division of Administrative Hearings for Recommendation by an Impartial Hearing Officer After Consideration of Transcripts Previously Ordered."

The motion indicates that the Administrative Law Judge "clearly and erroneously stated that his decision was made, as if no transcript had been ordered of the five days of hearings he held. That officer himself had ordered an excerpt and knew of several other excerpts added to the record to justify motion(s) for his recusal." The motion further states, "[i]n this instance, in light of the critical error made by the [Administrative Law Judge], about a supposed lack of any transcript including an excerpt he himself tried to secretly order, the Commission should remand with instruction for an Administrative Law Judge other than [Judge Hooper] to review the evidence, after transcripts are submitted, certainly those previously ordered by Petitioner." The motion concludes,

"...Petitioner moves for the Commission to remand for a recommended order by an impartial fact-finder after consideration of transcripts already on file and those to be prepared pursuant to Petitioner's Apr. 25, 2006, request."

In our view, the motion requests the Commission to order something that the Commission does not have the authority to order, the recusal of the Administrative Law Judge, a reevaluation of the evidence by a new Administrative Law Judge, and the issuance of a new Recommended Order by the new Administrative Law Judge.

In a case in which a Petitioner filed exceptions to the Recommended Order based on the Administrative Law Judge's refusal to recuse himself, a Commission panel stated: "With regard to the Administrative Law Judge's failure to recuse himself, in denying a similar exception a Commission panel has stated, 'To be entitled to recusal, a movant must show more than that the Administrative Law Judge has entered some orders against the position of the movant - rather the movant must 'have a well-grounded fear that he would not receive a fair hearing. The fears of judicial bias must be objectively reasonable.' Palmer v. Agency for Health Care Administration, 20 F.A.L.R. 1234, at 1236, Order of Administrative Law Judge Mary Clark (June 21, 1996). Further, the assignment of Administrative Law Judges is within the purview of the Division of Administrative Hearings. See, Section 120.569(2)(a), Florida Statutes (1999).' Garrepy v. Department of Environmental Protection, FCHR Order No. 01-024 (April 19, 2001). The Administrative Procedure Act states, 'The agency in its final order may reject or modify conclusions of law over which it has substantive jurisdiction and interpretation of administrative rules over which it has substantive jurisdiction...The agency may not reject or modify findings of fact unless the agency first determines from a review of the entire record, and states with particularity in the order, that the findings of fact were not based on competent substantial evidence or that the proceedings on which the findings were based did not comply with the essential requirements of law.' Section 120.57(1)(l), Florida Statutes (2003). While, as indicated, the Commission can review the record of a case to determine whether the proceeding leading to the findings of fact in the Recommended Order meets with the essential requirements of law, it would appear unlikely that an Administrative Law Judge's refusal to recuse himself would amount to a conclusion of law within the substantive jurisdiction of the Commission." Assily v. Memorial Hospital of Tampa, FCHR Order No. 05-059 (May 31, 2005).

For the same reasoning set out above, Petitioner's "Motion to Remand to the Division of Administrative Hearings for Recommendation by an Impartial Hearing Officer After Consideration of Transcripts Previously Ordered" is DENIED.

"Petitioner's Motion to Set Aside Recommended Order
Entered by Judge Harry L. Hooper Who Declared
Erroneously Therein that "No Transcript was Ordered"

Petitioner filed with the Division of Administrative Hearings, with a copy to the Commission, a motion entitled, "Petitioner's Motion to Set Aside a Recommended Order

Entered by Judge Harry L. Hooper Who Declared Erroneously Therein that 'No Transcript was Ordered.'" This motion was received by the Commission on June 6, 2006.

The content of the motion suggests that the motion was filed with the Division of Administrative Hearings for the purpose of seeking to have the Recommended Order set aside. The content of Petitioner's subsequent "Motion to Remand to the Division of Administrative Hearings for Recommendation by an Impartial Hearing Officer After Consideration of Transcripts Previously Ordered" suggests that it was the intent of Petitioner to place the motion before the Division of Administrative Hearings.

In our view, this motion does not appear to be pending before the Commission.

Nevertheless, to the extent this motion is pending before the Commission, we conclude that our decision to adopt the Recommended Order's findings of fact and conclusions of law, above, as well as our ruling on Petitioner's "Motion to Remand to the Division of Administrative Hearings for Recommendation by an Impartial Hearing Officer After Consideration of Transcripts Previously Ordered," above, render this motion MOOT.

"Respondent's Motion for
Award of Attorney's Fees And Costs"

Respondent filed "Respondent's Motion for Award of Attorney's Fees and Costs," received by the Commission on June 16, 2006.

The motion indicates, among other things, "Respondent is entitled to fees because Petitioner's claims were frivolous, unreasonable and without foundation. Other than the bare allegations of his pleadings, Petitioner was unable to produce any evidence of discrimination or retaliation. Petitioner was unable to even establish the elements of a prima facie case of discrimination based upon age, race, handicap or retaliation...Furthermore, at Petitioner's insistence, the hearing was scheduled for five days in which Petitioner repeatedly attempted to submitted [sp] evidence unrelated to his claims and made lengthy arguments on irrelevant points, but was unable to produce evidence of even a prima facie case of discrimination."

The Florida Civil Rights Act of 1992 states, "In any action or proceeding under this subsection, the [C]ommission, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. It is the intent of the Legislature that this provision for attorney's fees be interpreted in a manner consistent with federal case law involving a Title VII action." Section 760.11(6) and (7), Florida Statutes (2005).

In conclusions of law adopted by a Commission panel, it has been stated that a prevailing Respondent may be awarded attorney's fees by the Commission, under the Florida Civil Rights Act of 1992, "if it is determined that an action was 'frivolous, unreasonable, or without foundation,' or 'that the plaintiff continued to litigate after it clearly became so.' Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421-422

(1978)." Tadlock v. Westinghouse Electric Corporation, d/b/a Bay County Energy Systems, Inc., 20 F.A.L.R. 776, at 777 (FCHR 1997), citing Wright v. City of Gainesville, 19 F.A.L.R. 1947, at 1959 (FCHR 1996). Accord, generally, Asher v. Barnett Banks, Inc., 18 F.A.L.R. 1907 (FCHR 1995).

In conclusions of law adopted by a Commission panel, this pronouncement is given explanation: "It is within the discretion of a district court to award attorney's fees to a prevailing defendant in a Title VII action upon a finding that the action was 'frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.' Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978). The standard has been described as a 'stringent' one. Hughes v. Rowe, 449 U.S. 5, 14, 101 S.Ct. 173, 178, 66 L.Ed.2d 163 (1980). Moreover, the Supreme Court has cautioned that in applying these criteria, the district court should resist the temptation to conclude that because a plaintiff did not ultimately prevail, the action must have been unreasonable or without foundation. Christianburg Garment, 434 U.S. at 421-22, 98 S.Ct. at 700-01. Therefore, in determining whether a prevailing defendant is entitled to attorney's fees under Title VII, the district court must focus on the question of whether the case is seriously lacking in arguable merit. See Sullivan v. School Board of Pinellas County, 773 F.2d 1182, 1188 (11th Cir. 1985)." Doshi v. Systems and Electronics, Inc., f/k/a Electronics and Space Corp., 21 F.A.L.R. 188, at 199 (FCHR 1998).

As noted above, the Commission's file does not contain a transcript of the proceeding before the Administrative Law Judge, and we conclude, as is our discretion, that the record as it currently exists does not reflect entitlement to attorney's fees under the standards set out above. Accord, generally, Haynes v. Putnam County School Board, FCHR Order No. 04-162 (December 23, 2004), and Waaser v. Streit's Motorsports, FCHR Order No. 04-157 (November 30, 2004).

"Respondent's Motion for Award of Attorney's Fees and Costs" is DENIED.

Dismissal

The Petitions for Relief and Complaints 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 to appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure 9.110.

DONE AND ORDERED this 1st day of August, 2006.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Gilbert M. Singer, Panel Chairperson;
Commissioner Gayle Cannon; and
Commissioner Dominique B. Saliba, M.D.

Filed this 1st day of August, 2006,
in Tallahassee, Florida.

for Violet Crawford, Clerk
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Harry L. Hooper, 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 1st day of August, 2006.

By: for
Clerk of the Commission
Florida Commission on Human Relations