

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

MOHAMED DALHY,)
)
 Petitioner,)
)
 vs.) Case No. 05-2399
)
 GRAND CYPRESS RESORT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Administrative Law Judge (ALJ) Daniel Manry conducted the formal hearing of this case on August 12, 2005, in Orlando, Florida, on behalf of the Division of Administrative Hearings (DOAH).

APPEARANCES

For Petitioner: No appearance

For Respondent: Joanne B. Lambert, Esquire
Jackson Lewis LLP
390 North Orange Avenue, Suite 1285
Post Office Box 3389
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STATEMENT OF THE ISSUE

The issue presented is whether Respondent discriminated against Petitioner on the basis of his religion and national origin in violation of Section 760.10, Florida Statutes (2003).

PRELIMINARY STATEMENT

On June 1, 2005, the Florida Commission on Human Relations (Commission) notified Petitioner that the Commission had determined there was no reasonable cause to believe an unlawful employment practice had occurred. Petitioner filed a Petition for Relief on June 15, 2005, and the Commission referred the matter to DOAH to conduct an administrative hearing. At the hearing, Petitioner did not appear and did not present any evidence.

Respondent submitted 24 exhibits for admission into evidence and called one witness to testify. The identity of the exhibits and witness and the rulings regarding each are reported in the record of the hearing. Neither party requested a transcript of the hearing, and neither party submitted a proposed recommended order.

FINDINGS OF FACT

1. No findings are made concerning the merits of the allegations of discrimination. Petitioner did not appear and did not submit any evidence to support any findings of fact.

2. Petitioner received adequate notice of the formal hearing. The ALJ issued a Notice of Hearing on July 19, 2005, notifying the parties of the time and place of the hearing conducted on August 12, 2005. DOAH mailed the Notice of Hearing, by United States Postal Service (mailed), to Petitioner

at the address of record listed in the DOAH file as 10914 Mystic Circle, Apartment 204, Orlando, Florida 32836 (the address of record). The Notice of Hearing was properly addressed, stamped, and mailed. The U.S. Postal Service did not return the Notice of Hearing as undeliverable.

3. On July 5 and 19, 2005, DOAH mailed an Initial Order and Order of Pre-Hearing Instructions (Pre-hearing Order) to Petitioner. The U.S. Postal Service did not return either order as undeliverable.

4. The address of record in the DOAH filed is the same address that Petitioner listed in the Charge of Discrimination and Petition for Relief filed with the Commission. The Commission addressed the "Notice of Determination: No Cause" to the same address as the address of record in the DOAH file.

5. Petitioner was employed by Respondent on the date of the hearing. A representative of the personnel department for Respondent testified at the hearing (the witness).

6. Petitioner had requested and been granted annual leave for the day of the hearing and the day before the hearing. On the date of hearing, Petitioner resided at the address of record.

7. At the request of the ALJ, the witness telephoned Petitioner from the hearing room at the telephone number listed in Respondent's personnel file. The witness is the Director of

Personnel for Respondent, knows Petitioner personally, and has a longstanding employment relationship with Petitioner.

8. The witness spoke directly to Petitioner. English is not the native language for Petitioner, but the witness had no difficulty communicating with Petitioner.

9. The witness informed Petitioner that the ALJ would recess the hearing and wait for Petitioner to appear at the hearing. Petitioner refused to avail himself of the opportunity to appear at the hearing. Petitioner claimed he was not prepared for the hearing and had not had adequate time to prepare for the hearing.

10. Petitioner had adequate time to prepare for the hearing. The DOAH file shows the Commission referred this matter to DOAH by cover letter dated June 30, 2005. DOAH received the referral on July 5, 2005, and issued an Initial Order on the same date. On July 19, 2005, DOAH mailed the Pre-hearing Order and Notice of Hearing to Petitioner.

11. When Petitioner received the Initial Order shortly after July 5, 2005, Petitioner knew, or should have known, of the need to begin preparing for the formal hearing. The Initial Order requires the parties, inter alia, to estimate how long the formal hearing will take for both parties to present their evidence.

12. Petitioner knew, or should have known, of his right to discovery and the need to complete discovery no later than five days before the date of the hearing. The Summary of Procedures attached to the Initial Order provides, in relevant part:

1. Discovery may be undertaken in the manner provided in the Florida Rules of Civil Procedure and should be initiated immediately if desired. Necessary subpoenas and Orders may be obtained through the assigned Judge. Discovery must be completed 5 days before the date of the final hearing unless an extension of time for good cause is granted.

13. Petitioner did not respond to the Initial Order. Respondent filed a unilateral response to the Initial Order with DOAH on July 12, 2005. On the same date, Respondent served Petitioner with a copy of the unilateral response.

14. When Petitioner received the Prehearing Order shortly after July 19, 2005, Petitioner knew, or should have known, of the need to prepare for the formal hearing. The Pre-hearing Order, dated July 19, 2005, provides, in relevant part:

1. No later than 15 days prior to the final hearing Petitioner and Respondent shall provide each other with a list of the names and addresses of those persons which that party intends to call as witnesses during the final hearing in this cause and shall provide to each other copies of the documents which that party intends to offer as exhibits during the final hearing. Failure to do so may result in the exclusion at the final hearing of witnesses or exhibits not previously disclosed. . . .

2. No later than 12 days prior to the final hearing in this cause, the parties shall confer with each other to determine whether this cause can be amicably resolved.

15. Petitioner declined to participate in the discovery described in the Pre-hearing Order. Respondent unilaterally filed its witness list with DOAH on August 1, 2005. On the same date, Respondent served Petitioner with a copy of the witness list.

16. On August 10, 2005, at 2:45 p.m., Petitioner filed with DOAH, by facsimile, a hand-written request for continuance (motion for continuance). The motion for continuance is written in English and signed by Petitioner; as were the Petition for Relief and Charge of Discrimination. The motion requests a continuance, "[S]o I can get a lawyer, witnesses, and prepare myself for hearing."

17. The motion for hearing does not include a certificate of service or other indication that Petitioner served Respondent with a copy of the motion for continuance. On its face, the motion is an ex-parte communication.

18. On August 10, 2005, an administrative secretary of DOAH telephoned counsel for Respondent to determine whether counsel had received a copy of the motion and whether Respondent objected to the motion for continuance. Counsel had not

received the motion. Upon hearing the motion read to counsel, counsel objected to the motion.

19. At the instruction of the ALJ, the administrative secretary telephoned Petitioner and spoke to a person who identified himself as the son of Petitioner. The administrative secretary advised him that the ALJ had denied the motion for continuance and that Petitioner should attend the formal hearing on August 12, 2005.

20. On August 10, 2005, the ALJ also issued a written Order Denying Continuance that memorialized the ore tenus denial of the motion. DOAH mailed the written order to Petitioner on the same date to the address of record. The Order was properly addressed, stamped, and mailed.

21. Insufficient time to prepare for the formal hearing arguably is good cause for a continuance. However, Petitioner knew, or should have known, that a motion for continuance for good cause must be filed no later than five days before the formal hearing. The Initial Order received by Petitioner shortly after July 5, 2005, provides, in relevant part:

4. Rule 28-106.210, Florida Administrative Code, provides that requests for continuances must be made at least 5 days prior to the date of the hearing, except in cases of extreme emergency, and will be granted only by Order of the Judge for good cause shown.

22. The applicable rule arguably required Petitioner to file the motion for continuance based on good cause no later than August 8, 2005, because August 7, 2005, was a Sunday.¹ However, Petitioner did not file the motion for continuance until August 10, 2005.

23. The applicable rule authorized the ALJ to grant a motion for continuance filed less than five days before the formal hearing, only on grounds that satisfy the test of extreme emergency. Assuming arguendo that Petitioner had insufficient time to prepare for the formal hearing, that ground is not an extreme emergency. Petitioner knew, or should have known, long before August 10, 2005, that he would be unable to prepare for the formal hearing in the 24 days between July 19 and August 12, 2005.

24. Respondent had adequate time to prepare for the formal hearing. Respondent produced seven witnesses at the formal hearing, including four current employees and three former employees. Respondent also arranged for the attendance of a certified interpreter at the hearing. Respondent prepared 24 exhibits for admission into evidence. The Commission arranged for a court reporter to record the hearing. The ALJ traveled from Tallahassee to Orlando after instructing Petitioner, through the ALJ's administrative secretary, to attend the formal hearing.

25. If the ALJ were to have exercised discretion by granting a continuance requested less than five days before the hearing in the absence of an extreme emergency, such an exercise of discretion would have been inconsistent with a valid existing rule. A reviewing court would have been statutorily required to remand the case to DOAH for further proceedings consistent with the rule. § 120.68(7)(e)2., Fla. Stat. (2005).

CONCLUSIONS OF LAW

26. DOAH has jurisdiction over the parties and the subject matter of this proceeding. §§ 120.569 and 120.57(1), Fla. Stat. (2005). The parties received adequate notice of the formal hearing.

27. The Notice of Hearing mailed to the address of record for Petitioner, like the Initial Order and Pre-hearing Order, was properly addressed, stamped, and mailed and was not returned. A Notice or Order properly addressed, stamped, and mailed is presumed to be received by the addressee if not returned. Brown v. Giffen Industries, Inc., 281 So. 2d 897, 900 (Fla. 1973).

28. There is no direct evidence of discrimination in this case. In the absence of such evidence, discrimination must be shown by circumstantial evidence.

29. The burden of proof in discrimination cases involving circumstantial evidence is set forth in McDonnell Douglas Corp.

v. Green, 411 U.S. 792, 802-03 (1973). Petitioner has the initial burden of establishing by a preponderance of the evidence a prima facie case of discrimination. Failure to establish a prima facie case of discrimination ends the inquiry. See Ratliff v. State, 666 So. 2d 1008, 1012 n.6 (Fla. 1st DCA 1996), aff'd, 679 So. 2d 1183 (Fla. 1996)(citing Arnold v. Burger Queen Systems, 509 So. 2d 958 (Fla. 2d DCA 1987)).

30. Petitioner did not establish a prima facie case of discrimination. The inquiry is over.

RECOMMENDATION

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

RECOMMENDED that the Commission enter a final order dismissing the Petition for Relief.

DONE AND ENTERED this 1st day of September, 2005, in Tallahassee, Leon County, Florida.



DANIEL MANRY
Administrative Law Judge
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Filed with the Clerk of the
Division of Administrative Hearings
this 1st day of September, 2005.

ENDNOTE

1/ Respondent may argue that the rule required Petitioner to file the motion for continuance on August 5, 2005, a Friday, because the next business day was less than five days before the hearing. The ALJ does not rule on that specific issue because it is unnecessary to do so under the facts in this case.

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.