

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

06 MAY 30 PH 12: 39

MARINO M. GREEN,

Petitioner,

v.

DEPARTMENT OF HEALTH,

Respondent.

DIVISION OF
ADMINISTRATIVE
HEARINGS

EEOC Case No. 15DA500357

FCHR Case No. 2005-00518

DOAH Case No. 05-3149

FCHR Order No. 06-043

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

Preliminary Matters

Petitioner Marino M. Green, Ph.D., filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2003), alleging that Respondent Department of Health committed unlawful employment practices on the bases of Petitioner's race (Black) and retaliation, by failing to promote Petitioner and by terminating Petitioner.

The allegations set forth in the complaint were investigated, and, on July 21, 2005, the Executive Director issued his determination finding that there was no reasonable cause to believe that an unlawful employment practice had occurred.

Petitioner filed a Petition for Relief from an Unlawful Employment Practice, and the case was transmitted to the Division of Administrative Hearings for the conduct of a formal proceeding.

An evidentiary hearing was held on January 27, 2006, in Orlando, Florida, before Administrative Law Judge Charles C. Adams.

Judge Adams issued a Recommended Order of dismissal, dated March 28, 2006.

The Commission panel designated below considered the record of this matter 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, 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.

The Administrative Law Judge indicated that for Petitioner to establish a prima facie case of race discrimination it must be shown: "(1) that he is a member of a protected minority; (2) that he is qualified and applied for the promotion to BA II; (3) that he was rejected despite those qualifications; and (4) that someone equally or less qualified to fill the position and not a protected minority was promoted." Recommended Order, ¶ 58.

It should be noted that people of all races are entitled to establish discrimination claims under the Florida Civil Rights Act of 1992, not just those belonging to racial "minorities."

The Commission has adopted conclusions of law that reflect that to establish a prima facie case of discrimination one of the elements a Petitioner must demonstrate is "that he belongs to a group protected by the statute..." See Martinez v. Orange County Fleet Manager, 21 F.A.L.R. 163, at 164 (FCHR 1997), citing Arnold v. Department of Health and Rehabilitative Services, 16 F.A.L.R. 576, at 582 (FCHR 1993),...or that "she belongs to a protected group." Martinez v. Boca Diner, FCHR Order No. 04-019 (February 25, 2004), adopting conclusions of law set out in the Recommended Order of DOAH Case No. 03-1277, dated October 31, 2003.

These are more legally correct statements of the first element required to demonstrate a prima facie case of discrimination than that used by the Administrative Law Judge, and we hereby modify the first element of the test set out by the Administrative Law Judge, accordingly, as well as the reference to "protected minority" in the fourth element. Accord, Cesarin v. Dillard's, Inc., FCHR Order No. 03-037 (April 29, 2003); Saint Fleur v. Superior Protection, FCHR Order No. 03-072 (November 21, 2003); Bamawo v. Department of Corrections, FCHR Order No. 04-120 (September 22, 2004); Warren v. Department of Revenue, FCHR Order No. 04-152 (December 7, 2004); Assily v. Memorial Hospital of Tampa, FCHR Order No. 05-059 (May 31, 2005); Bowles v. Jackson County Hospital Corporation, FCHR Order No. 05-135 (December 6, 2005); and McGee v. AIG Marketing, Inc., FCHR Order No. 06-023 (March 7, 2006), all in which similar modifications to the conclusions of law were made by Commission panels.

In modifying this conclusion of law of the Administrative Law Judge, we conclude: (1) that the conclusion of law being modified is a conclusion of law over which the Commission has substantive jurisdiction, namely a conclusion of law stating what must be demonstrated to establish a prima facie case of unlawful discrimination under the Florida Civil Rights Act of 1992; (2) that the reason the modification is being made by the Commission is that the conclusion of law as stated runs contrary to previous

Commission decisions on the issue; and (3) that in making this modification the conclusion of law being substituted is as or more reasonable than the conclusion of law which has been rejected. See, Section 120.57(1)(1), Florida Statutes (2005).

We note that this modification does not affect the outcome of the case given the Administrative Law Judge's conclusion that Petitioner established a prima facie case of race discrimination (Recommended Order, ¶ 59), but that Respondent articulated legitimate, nondiscriminatory reasons for not promoting Petitioner, and there was no showing that these reasons were a pretext for unlawful discrimination (Recommended Order, ¶ 60).

With the indicated modification, we adopt the Administrative Law Judge's conclusions of law.

Exceptions

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

Dismissal

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 to appeal is found in Section 120.68, Florida Statutes, and in the Florida Rules of Appellate Procedure 9.110.

DONE AND ORDERED this 24th day of May, 2006.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Billy Whitefox Stall, Panel Chairperson;
Commissioner Donna Elam; and
Commissioner Dominique B. Saliba, M.D.

Filed this 24th day of May, 2006,
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, FL 32301
(850) 488-708

NOTICE TO COMPLAINANT / PETITIONER

As your complaint was filed under Title VII of the Civil Rights Act of 1964, which is enforced by the U.S. Equal Employment Opportunity Commission (EEOC), you have the right to request EEOC to review this Commission's final agency action. To secure a "substantial weight review" by EEOC, you must request it in writing within 15 days of your receipt of this Order. Send your request to Miami District Office (EEOC), One Biscayne Tower, 2 South Biscayne Blvd., Suite 2700, 27th Floor, Miami, FL 33131.

Copies furnished to:


Marino M. Green, Ph.D.
3023 Golden Pond Boulevard
Orange Park, FL 32073

Department of Health
c/o Stephen M. Foxwell, Esq.
4052 Bald Cypress Way, Bin A-02
Tallahassee, FL 32399-1703

Charles C. Adams, 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 24th day of May, 2006.

By: 
Clerk of the Commission
Florida Commission on Human Relations