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DIVISION OF ADMINISTRATIVE HEARINGS

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

MICHAEL L. PERRY,

Petitioner,

v.

EMBRY-RIDDLE AERONAUTICAL UNIVERSITY,

Respondent.

EEOC Case No. 15DA600138

FCHR Case No. 2006-00215

DOAH Case No. 06-1988

FCHR Order No. 07-048

FINAL ORDER DISMISSING PETITION FOR RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE

Preliminary Matters

Petitioner Michael L. Perry 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 Embry-Riddle Aeronautical University committed an unlawful employment practice on the basis of Petitioner's race (African-American) by terminating Petitioner from employment.

The allegations set forth in the complaint were investigated, and, on April 28, 2006, 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 March 12 and 13, 2007, in Tallahassee, Florida, and on March 26 and 27, 2007, in Daytona Beach, Florida, before Administrative Law Judge Robert S. Cohen.

Judge Cohen issued a Recommended Order of dismissal, dated June 15, 2007.

Pursuant to notice, public deliberations were held on September 6, 2007, by means of Communications Media Technology (namely, telephone) before this panel of Commissioners. The public access point for these telephonic deliberations was the Office of the Florida Commission on Human Relations, 2009 Apalachee Parkway, Suite 100, Tallahassee, Florida, 32301. At these deliberations, the Commission panel determined the action to be taken on the Recommended Order.

Findings of Fact

We find the Administrative Law Judge's findings of fact to be supported by competent substantial evidence.

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 adopt the Administrative Law Judge's conclusions of law.

Exceptions

Petitioner filed exceptions to the Administrative Law Judge's Recommended Order in a document entitled, "Petitioner Michael L. Perry's Exceptions to the Recommended Order and Supporting Legal Arguments," received by the Commission on July 2, 2007. The document contains eight numbered exceptions.

Petitioner's first exception apparently excepts to the finding in Recommended Order, ¶ 110, that Embry-Riddle employs 190 African-Americans out of 1500 total employees on its worldwide campuses.....and that ninety percent of those African-American individuals were in positions equal to or higher than that held by Petitioner. In our view, this finding is supported by competent substantial evidence in the record, notably the testimony of Linda Mobley at page 561 of the hearing transcript. Further, in our view, even if these numbers are incorrect, they have no impact on the outcome of this case.

Exception Number One is rejected.

Petitioner's second exception excepts to a finding in Recommended Order, ¶ 120, that Petitioner claims to have been the only African-American male serving as either an assistant center director or an associate center director. This, in our view, is an exception to an inference drawn from the evidence presented.

The Commission has stated, "It is well settled that it is the Administrative Law Judge's function 'to consider all of the evidence presented and reach ultimate conclusions of fact based on competent substantial evidence by resolving conflicts, judging the credibility of witnesses and drawing permissible inferences therefrom. If the evidence presented supports two inconsistent findings, it is the Administrative Law Judge's role to decide between them.' Beckton v. Department of Children and Family Services, 21 F.A.L.R. 1735, at 1736 (FCHR 1998), citing Maggio v. Martin Marietta Aerospace, 9 F.A.L.R. 2168, at 2171 (FCHR 1986)." Barr v. Columbia Ocala Regional Medical Center, 22 F.A.L.R. 1729, at 1730 (FCHR 1999).

This exception also seems to except to the Administrative Law Judge's conclusion that Petitioner's claim is a disparate treatment claim, yet, in Exception Number Three, Petitioner sets out an analysis by which it contends discrimination is proved by using a disparate treatment proof model.

Exception Number Two is rejected.

Petitioner's third exception takes issue to findings in Recommended Order, ¶ 121, that Respondent's investigation of alleged sexual harassment was "valid," and disputes the Administrative Law Judge's conclusion that no action was taken against Petitioner because of the sexual harassment claims made against him. Further, in the "Argument" section of this exception, Petitioner argues that discrimination was proved using a disparate treatment analysis and also suggests that Respondent may have decided to terminate Petitioner as an act of retaliation.

In our view, the Administrative Law Judge, in Recommended Order, ¶ 121, made no conclusion as to the "validity" of Respondent's sexual harassment investigation other than to note that the investigation resulted in a determination that claims of sexual harassment were not substantiated.

The Administrative Law Judge's conclusion that Petitioner failed to prove that his termination was based in any fashion upon the allegations of sexual harassment made against him is simply an inference drawn from the evidence presented. See Barr, supra.

While using a disparate treatment proof model, regardless of whether Petitioner established a prima facie case of discrimination as maintained by Petitioner, the Administrative Law Judge still concluded with regard to the next steps in the disparate treatment proof model analysis that, "Respondent provided legitimate, nondiscriminatory reasons for Petitioner's termination from his employment. The greater weight of the evidence indicates that Respondent did not commit an unlawful employment practice." Recommended Order, ¶ 127.

Finally, with regard to allegations of unlawful retaliation, there is no allegation of unlawful retaliation in the initial complaint filed in this case. The Commission has held that matters not raised in the initial complaint and investigated by the Commission cannot be raised for the first time before the Administrative Law Judge. See Costantini v. Wal-Mart Stores East, L.P., No. 5326, FCHR Order No. 07-032 (May 1, 2007) and Williams v. Department of Corrections, 23 F.A.L.R. 2576, at 2579 (FCHR 2001).

Exception Number Three is rejected.

Petitioner's fourth exception takes issue with facts found in Recommended Order, ¶ 122, which are contrary to Petitioner's position that he was not trusted on several occasions during Respondent's investigation because he was an African-American male.

In our view, the findings within Recommended Order, ¶ 122, are within the purview of the Administrative Law Judge. See Barr, supra.

Exception Number Four is rejected.

Petitioner's fifth exception takes issue with facts not found by the Administrative Law Judge, namely that in Recommended Order, ¶ 123, the Administrative Law Judge found that the evidence was not sufficient to make findings regarding whether Petitioner

had been ordered to apologize to the alleged victims of sexual harassment and Petitioner's resultant humiliation from this, given Mr. Borovich's testimony that he could not recall ordering or even requesting Petitioner to make those apologies.

In our view, the findings in Recommended Order, ¶ 123, are within the purview of the Administrative Law Judge. See Barr, supra.

Exception Number Five is rejected.

Petitioner's sixth exception takes issue with the Administrative Law Judge's finding in Recommended Order, ¶ 125, that given the information available to Respondent at the time, it was reasonable for Respondent to conclude that Petitioner had violated university policy with regard to the opening of the Nextel cellular telephone account.

In our view, the findings in Recommended Order, ¶ 125, are within the purview of the Administrative Law Judge. See Barr, supra.

Exception Number Six is rejected.

Petitioner's seventh exception apparently takes issue with the Administrative Law Judge's finding in Recommended Order, ¶ 126, that Petitioner did not establish that he was discriminated against on the basis of his race.

In our view, the findings in Recommended Order, ¶ 126, are within the purview of the Administrative Law Judge. See Barr, supra.

Exception Number Seven is rejected.

Petitioner's eighth exception takes issue with findings in Recommended Order, ¶ 127, containing the Administrative Law Judge's ultimate finding that the greater weight of the evidence indicates that Respondent did not commit an unlawful employment practice in this matter.

It is well settled that since an Administrative Law Judge's finding of whether discrimination occurred is a finding of fact, the Commission may overturn such a finding 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, Florida Department of Community Affairs v. Bryant, 586 So. 2d 1205, at 1210 (Fla. 1st DCA 1991).

We have found, above, that the Administrative Law Judge's findings of fact are supported by competent substantial evidence in the record.

Exception Number Eight is rejected.

Dismissal

The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

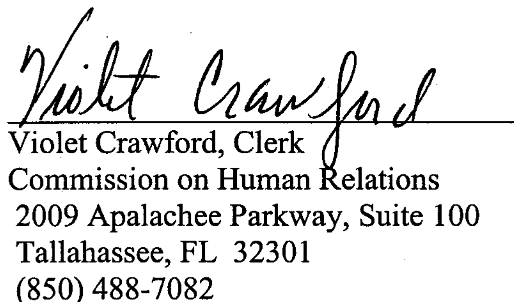
The parties have the right to seek judicial review of this Order. The Commission and the appropriate District Court of Appeal must receive notice of appeal within 30 days of the date this Order is filed with the Clerk of the Commission. Explanation of the right

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

DONE AND ORDERED this 7th day of September, 2007.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Rita Craig, Panel Chairperson;
Commissioner Shahrukh S. Dhanji; and
Commissioner Anice R. Prosser

Filed this 7th day of September, 2007,
in Tallahassee, Florida.



Violet Crawford, Clerk
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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:

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Robert S. Cohen, 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 7th day of September, 2007.

By: [signature]
Clerk of the Commission
Florida Commission on Human Relations