

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

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DIVISION OF
ADMINISTRATIVE
HEARINGS

JANET CARTWRIGHT,

Petitioner,

v.

FLORIDA DEPARTMENT OF REVENUE,

Respondent.

EEOC Case No. NONE

FCHR Case No. 2005-02800

DOAH Case No. 06-2131

FCHR Order No. 07-018

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

Preliminary Matters

Petitioner Janet Cartwright 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 Florida Department of Revenue committed unlawful employment practices on the bases of Petitioner's race (white) and sex (female) by subjecting Petitioner to disparate treatment and harassment, denying Petitioner training, and terminating Petitioner from her position as a Tax Auditor II.

The allegations set forth in the complaint were investigated, and, on April 24, 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 December 4, 2006, in Tallahassee, Florida, before Administrative Law Judge Lisa Shearer Nelson.

Judge Nelson issued a Recommended Order of dismissal, dated January 2, 2007.

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 discrimination in this case, Petitioner must show that: "1) she belongs to a racial minority or is female; 2) she was subjected to adverse employment actions; 3) she was qualified for her position; and 4) the Respondent treated similarly situated employees outside the protected class more favorably." Recommended Order, ¶ 25.

As indicated, the Administrative Law Judge concluded that one of the elements Petitioner must show to establish a prima facie case of discrimination is that she is a member of a "racial minority."

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 a "racial minority."

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 accordingly make this modification to the first element of the test set out by the Administrative Law Judge. 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); McGee v. AIG Marketing, Inc., FCHR Order No. 06-023 (March 7, 2006), Mays v. Progress Energy Corporation, FCHR Order No. 06-024 (March 7, 2006), Jones v. Suwannee County School Board, FCHR Order No. 06-088 (September 11, 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).

This correction will not affect the outcome of the case given the Administrative Law Judge's conclusion that Petitioner failed to establish a prima facie case of discrimination in that Petitioner failed to demonstrate that "other similarly situated employees outside the protected class were treated more favorably." See Recommended Order, ¶ 25.

We also note that the Administrative Law Judge concluded that the complaint in this matter was not timely-filed (i.e., that it was not filed within 365 days of the alleged discriminatory acts), and therefore the Petition for Relief should be dismissed (See Recommended Order, ¶ 23). But the Administrative Law Judge also decided the case on the merits, indicating that Petitioner failed to establish a prima facie case of discrimination (Recommended Order, ¶ 25).

In a similar situation a Commission panel stated, "Because of findings of fact and conclusions of law indicating that the matter should be dismissed for lack of the existence of a prima facie case of discrimination, we find it unnecessary to either accept or reject the conclusion of law that the complaint of discrimination was untimely. Accord, Cox v. University of Florida, FCHR Order No. 04-145 (November 4, 2004), in which a Commission panel declined to either accept or reject a conclusion of law which was not dispositive of the case given the decision on the merits, namely, that the Petition for Relief was not timely." Roche v. J. C. Penney Company, Inc., FCHR Order No. 06-078 (September 18, 2006).

Similarly, because of the decision on the merits against Petitioner, we conclude it is unnecessary to either accept or reject the conclusion of law that the complaint of discrimination, specifically as to Petitioner's termination, was untimely. Accord, Bagley v. City of Tampa, Florida, FCHR Order No. 06-101 (November 13, 2006).

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

Exceptions

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

Dismissal

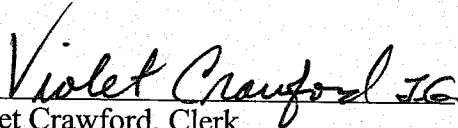
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 16th day of March, 2007.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Gilbert M. Singer, Panel Chairperson;
Commissioner Gayle Cannon; and
Commissioner Billy Whitefox Stall

Filed this 16th day of March, 2007,
in Tallahassee, Florida.


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Lisa Shearer Nelson, 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 16th day of March, 2007.

By: Violet Crawford JG.
Clerk of the Commission
Florida Commission on Human Relations