

FILED
STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS
07 MAY -3 AM 10:25

URSULA COSTANTINI,

DIVISION OF
ADMINISTRATIVE
HEARINGS

EEOC Case No. 15DA500967

Petitioner,

FCHR Case No. 2005-02943

v.

DOAH Case No. 06-2461

WAL-MART STORES EAST, L.P.,
NO. 5326,

FCHR Order No. 07-032

Respondent.

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

Preliminary Matters

Petitioner Ursula Costantini 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 Wal-Mart Stores East, L.P., No. 5326, committed an unlawful employment practice on the bases of Petitioner's sex (female) and age (DOB: 12-5-35) when it sought to change Petitioner's hours and subsequently terminated Petitioner's employment when she would not comply. The Petition for Relief contained the additional allegation of unlawful retaliation.

The allegations set forth in the complaint were investigated, and, on June 15, 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 November 9, 2006, in Ocala, Florida, before Administrative Law Judge Barbara J. Staros.

Judge Staros issued a Recommended Order of dismissal, dated February 28, 2007.

Pursuant to notice, public deliberations were held on April 26, 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.

Parenthetically, in our view, the issue of "retaliation" should not have been before the Administrative Law Judge because it was not raised in the initial complaint, but rather, was raised for the first time in the Petition for Relief. See filings, and see also, Williams v. Department of Corrections, 23 F.A.L.R. 2576, at 2579 (FCHR 2001), where, in conclusions of law adopted by a Commission Panel in a case in which allegations of race discrimination were brought for the first time in the Petition for Relief, it was stated, "The Department argued that because Petitioner had not raised the issue of racial discrimination with the Florida Commission on Human Relations, it was not properly before the Division of Administrative Hearings. The Respondent's Motion to Strike was granted orally on the record, noting that prior recommended orders of the Division of Administrative Hearings had found that a failure to include a particular charge in one's complaint filed with the Florida Commission on Human Relations precluded the inclusion of the charge in one's petition for relief."

With this comment, 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, "Exceptions to the Recommended Order," received by the Commission on March 13, 2007.

With regard to exceptions to Recommended Orders, the Administrative Procedure Act states, "The final order shall include an explicit ruling on each exception, but an agency need not rule on an exception that does not clearly identify the disputed portion of the recommended order by page number or paragraph, that does not identify the legal basis for the exception, or that does not include appropriate and specific citations to the record." Section 120.57(1)(k), Florida Statutes (2006).

A review of Petitioner's exceptions document suggests that the document does not comply with this statutory provision. Accord, generally, Hawkins v. Best Western, FCHR Order No. 07-022 (March 12, 2007).

Nevertheless, the document does appear to take issue with the facts found, facts not found, and inferences 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). Accord, Bowles v. Jackson County Hospital Corporation, FCHR Order No. 05-135 (December 6, 2005).

Petitioner's exceptions are rejected.

Dismissal

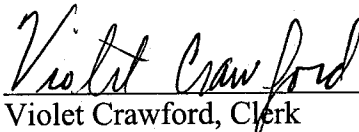
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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 1st day of May, 2007.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam, Panel Chairperson;
Commissioner Onelia A. Fajardo; and
Commissioner Mario M. Valle

Filed this 1st day of May, 2007,
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
209 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:

Ursula Costantini
5108 Southwest 104th Loop
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Wal-Mart Stores East, L.P., No. 5326
c/o Amy R. Harrison, Esq.
c/o Lindsay A. Connor, Esq.
Ford & Harrison, LLP
225 Water Street, Suite 710
Jacksonville, FL 32202

Barbara J. Staros, 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 May, 2007.

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