

STATE OF FLORIDA
DIVISION OF ADMINISTRATIVE HEARINGS

EVELYN MARTINEZ,)
)
 Petitioner,)
)
 vs.) Case No. 06-2904
)
 KJC ENTERPRISES, d/b/a)
 PLANTATION ISLAND RESORT,)
)
 Respondent.)
 _____)

RECOMMENDED ORDER

Upon due notice, a disputed-fact hearing was held in this case on January 16, 2007, in Deland, Florida, before Ella Jane P. Davis, a duly-assigned Administrative Law Judge of the Division of Administrative Hearings.

APPEARANCES

For Petitioner: No Appearance

For Respondent: C. Anthony Schoder, Jr., Esquire
Smith & Schoder, LLP
605 South Ridgewood Avenue
Daytona Beach, Florida 32114

STATEMENT OF THE ISSUE

Whether Respondent Employer is guilty of an unlawful employment practice on the basis of failure to hire (sex discrimination), sexual harassment, and/or retaliatory termination.

PRELIMINARY STATEMENT

On or about January 3, 2006, Petitioner filed a Charge of Discrimination with the Florida Commission on Human Relations. On July 6, 2006, the Commission entered its Determination: No Cause. A Petition for Relief was treated as timely-filed by the Commission, and the case was transmitted to the Division of Administrative Hearings on or about August 15, 2006.

The remainder of the pre-trial history of this case is reserved for the Findings of Fact, infra.

FINDINGS OF FACT

1. This case was referred to the Division of Administrative Hearings on or about August 15, 2006.

2. The parties filed respective responses [sic "compliances"] with the Initial Order herein, which responses were considered in setting the case for hearing.

3. Petitioner's response requested that the final disputed-fact hearing be scheduled for any day after October 12, 2006.

4. On September 6, 2006, final hearing was noticed for November 8, 2006.

5. On October 5, 2006, Petitioner provided a change of address to New York.

6. On October 10, 2006, a joint Pre-hearing Stipulation was filed.

7. On October 23, 2006, Petitioner filed a Motion to Continue [sic "Request for Continuance for Good Cause"].

8. On October 27, 2006, Respondent filed its Objection to Petitioner's Request for Continuance.

9. On November 1, 2006, a motion hearing was held by telephonic conference call. At that time, both parties agreed to continue the final disputed-fact hearing to January 16, 2007. Petitioner was orally cautioned that no further continuances would be granted except upon good cause shown.

10. Also on November 1, 2006, an Order Granting Continuance and Re-Scheduling Hearing was entered and mailed. The new date noticed for final hearing in that Order was January 16, 2007, as follows:

2. This cause is hereby re-scheduled for final hearing on January 16, 2007, at 10:00 a.m., at the Department of Transportation, Seminole County Conference Room, 4th Floor, 719 South Woodland Boulevard, Deland, Florida.

11. On January 8, 2007, Petitioner filed a Motion, titled "Motion Requesting a Continuance of Hearing Date for Good Cause."

12. Apparently also on January 8, 2007, Respondent filed a response in opposition to the proposed continuance, but this item was not seen by the undersigned until January 16, 2007, at the final hearing.^{1/}

13. Petitioner's Motion did not, in fact, state good cause for a continuance and was denied by an Order entered January 10, 2007, which Order was mailed that day to Petitioner's address of record in New York. On January 11, 2007, a copy of the Order was mailed to the Florida address which Petitioner had given under her signature on her Motion.

14. On January 16, 2007, the final disputed-fact hearing was convened as noticed in the November 1, 2006, Order. At that time, the undersigned, a court reporter, Respondent's counsel, Respondent's principal, and two additional witnesses on behalf of Respondent were present. Petitioner was not present.

15. The undersigned inquired by telephone of her office staff and of the Clerk of the Division of Administrative Hearings if Petitioner had contacted the Division with any explanation for her absence and was told that she had not.

16. The undersigned sounded the docket in the hallway of the hearing room in Deland and inquired at the front desk. Petitioner had not appeared in the building.

17. After waiting 30 minutes, Petitioner still had not appeared.

18. Respondent's counsel represented on the record that he had spoken to Petitioner by phone on January 10, 2007, at which time Petitioner had told him that she would not appear for the January 16, 2007, hearing herein. He produced a January 10,

2007, letter he had sent Petitioner at the Florida address she had used on her second motion to continue. (See Findings of Fact 11 and 13.) Respondent's counsel's letter was admitted as Exhibit R-1, and represents that Respondent's counsel advised Petitioner that her motion to continue had been denied and that the final disputed-fact hearing would be going forward on January 16, 2007, as previously noticed for hearing on November 1, 2006. (See Finding of Fact 10.)

19. Respondent then moved ore tenus for a Recommended Order of Dismissal, which was taken under advisement, pending the undersigned's return to the Division of Administrative Hearings and further inquiries as to why Petitioner had not appeared for the final disputed-fact hearing.

20. Respondent next moved ore tenus to tax fees and costs, and presented Exhibit R-2, itemizing the charges of Respondent's counsel to Respondent and further presented the testimony of Respondent's principal, James Frank Kulger, in support thereof. Respondent's counsel was granted five days in which to file an affidavit of reasonableness in regard to the services and charges billed on Exhibit R-2. That affidavit was timely filed, and has been marked and admitted as Exhibit R-3. No transcript was provided.

21. Upon the undersigned's personal inquiries, when she returned to Tallahassee, of her office staff and of the Clerk of

the Division of Administrative Hearings on January 17, 2007, the undersigned was yet again informed that Petitioner still had not contacted the Division with any excuse for not attending the previously-noticed final disputed-fact hearing on January 16, 2007.

22. On January 18, 2007, the undersigned's secretary informed her that Petitioner telephoned the secretary to the undersigned and indicated that prior to January 16, 2007, Petitioner had received the January 10, 2007, Order denying a continuance; knew the final hearing had remained scheduled for January 16, 2007; and had elected not to attend the hearing. Petitioner inquired if the hearing had gone forward anyway, and was told by the secretary that it had. Petitioner inquired if an order had been entered and was informed that one had not.

CONCLUSIONS OF LAW

23. The Division of Administrative Hearings has jurisdiction over the parties and subject matter of this cause, pursuant to Sections 120.57(1), 120.569, and 760.11, Florida Statutes.

24. The duty to go forward and the burden of proof in this cause is upon Petitioner. §§ 760.10-760.11, Fla. Stat. Texas Department of Community Affairs v. Burdine, 450 U.S. 248, 101 S. Ct. 1089, 67 L. Ed. 2d 207 (1981); Department of Corrections v. Chandler, 582 So. 2d 1183 (Fla. 1st DCA 1991).

By her willful failure to appear, Petitioner failed to put on any case, let alone a prima facie one. Accordingly, she cannot prevail herein.

25. Respondent has clearly incurred considerable costs and attorney's fees in defense of the Petition for Relief. However, the statute is clear that only the Florida Commission on Human Relations may determine entitlement to fees and costs. See § 760.11(6), Fla. Stat. Moreover, it is premature to grant attorney's fees and costs until a Final Order is entered. Responsibility for determination of the amount of fees and costs would occur only upon remand to the undersigned by FCHR for those purposes.

RECOMMENDATION

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

RECOMMENDED that the Florida Commission on Human Relations enter a final order dismissing the Charge of Discrimination and Petition for Relief.

DONE AND ENTERED this 31st day of January, 2007, in
Tallahassee, Leon County, Florida.



ELLA JANE P. DAVIS
Administrative Law Judge
Division of Administrative Hearings
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Filed with the Clerk of the
Division of Administrative Hearings
this 31st day of January, 2007.

ENDNOTE

^{1/} This response had attached to it to a November 13, 2006, Order of the Circuit Court of the Seventh Judicial Circuit, in and for Volusia County, declaring Petitioner, pursuant to Florida Statutes Section 68.093, a "vexatious litigant" in a circuit court case involving defendants other than Respondent herein. That Order restricts Petitioner's right to file, pro se, any new action in the courts of the Seventh Circuit after that date, but the Order has no bearing on this administrative case, brought pursuant to Section 120.57(1), Florida Statutes.

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.