

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

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DAVID W. DEY,

Petitioner,

v.

CITY OF KISSIMMEE,

Respondent.

DIVISION OF
ADMINISTRATIVE
HEARINGS

EEOC Case No. 15DA600485

FCHR Case No. 2006-01150

DOAH Case No. 06-3532

FCHR Order No. 07-055

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

Preliminary Matters

Petitioner David W. Dey 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 City of Kissimmee committed unlawful employment practices on the basis of Petitioner's disability (brittle diabetes mellitus, Type II), and on the basis of retaliation, with regard to work scheduling issues, the denial of promotions, the imposition of discipline, and the demand for medical documentation.

The allegations set forth in the complaint were investigated, and, on August 14, 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 April 19 and 20, 2007, in Kissimmee, Florida, before Administrative Law Judge Daniel Manry.

Judge Manry issued a Recommended Order of dismissal, dated July 16, 2007.

Pursuant to notice, public deliberations were held on October 10, 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 note that the Administrative Law Judge concluded that the evidence did not support a finding that the verbal reprimand given Petitioner was an "adverse employment action," and there was no evidence that Respondent "would not have disciplined Petitioner but for the alleged disability." Recommended Order, ¶ 81.

In a case in which an Administrative Law Judge concluded that Petitioner's receipt of an "oral reprimand" and "memo of counseling" did not amount to adverse employment actions, a Commission panel noted, "While we will not disturb these conclusions as made by the Administrative Law Judge within the circumstances of the facts of this case, we do note that the receipt of these types of discipline can amount to an adverse employment action. See, generally, Baxla v. Fleetwood Enterprises, Inc., d/b/a Fleetwood Homes of Florida, Inc., 20 F.A.L.R. 2583 (FCHR 1998)." Warren v. Department of Revenue, FCHR Order No. 04-152 (December 7, 2004).

With this same 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, "Petitioner's Exceptions to Recommended Order," received by the Commission on July 31, 2007.

Petitioner excepts to findings of fact numbered 2 through 8 of the Recommended Order, dealing with whether Petitioner is disabled. The determination by the Administrative Law Judge that Petitioner is not disabled is not ultimately dispositive of the case given the Administrative Law Judge's conclusion that even if Petitioner was disabled he still did not present a prima facie case of discrimination as to Petitioner's failure to attain either the shift supervisor position or the parking enforcement specialist position, nor did he show that he received the verbal reprimand but for his alleged disability. Recommended Order, ¶ 77, ¶ 79, and ¶ 81.

This exception is rejected.

Petitioner excepts that references to Dr. Mandry at Recommended Order, ¶ 9 and ¶ 43 are not dispositive of whether Petitioner is disabled. The Administrative Law Judge sets out in some detail his conclusion as to why Petitioner is not disabled, and, in our view, the conclusion does not rest on the findings in these two Recommended Order paragraphs. See Recommended Order, ¶ 72 through ¶ 74.

This exception is rejected.

Petitioner notes Recommended Order, ¶ 10 through ¶ 16, and excepts that appropriate facts were not found therein relating to communication between Petitioner and Respondent regarding Petitioner's medical condition. Petitioner also takes issue with facts found in Recommended Order, ¶ 39 through ¶ 42, as they portray what occurred in relation to a call-back assignment incident. Petitioner takes issue with facts found in Recommended Order, ¶ 44 through 52, including the suggestion that the denial of promotion to the shift supervisor position was not an adverse employment action. Petitioner excepts to findings of fact in Recommended Order, ¶ 53 through ¶ 59, relating to the selection process for the parking enforcement specialist position. Petitioner excepts to findings of fact in Recommended Order, ¶ 61 through ¶ 65, relating to the verbal reprimand surrounding the hurricane preparation issue.

In each instance, these exceptions take issue with facts found and/or facts not found from the evidence presented. While we would agree with Petitioner that the denial of a promotion is an adverse employment action, in this instance there was no denial of promotion since Petitioner never applied for the position.

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).

These 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 12th day of October, 2007.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam, Panel Chairperson;
Commissioner Shahrukh S. Dhanji; and
Commissioner Anice R. Prosser

Filed this 12th day of October, 2007,
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 100
Tallahassee, FL 32301
(850) 488-7082

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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Daniel Manry, Administrative Law Judge, DOAH

James Mallue, Legal Advisor for Commission Panel

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I HEREBY CERTIFY that a copy of the foregoing has been mailed to the above listed addressees this 12th day of October, 2007.

By:

Violet Crawford

Clerk of the Commission

Florida Commission on Human Relations