

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS
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MILDRED SPEARS,

Petitioner,

v.

C. J. GAYFERS AND COMPANY,
d/b/a DILLARDS,

Respondent.

DIVISION OF
ADMINISTRATIVE
HEARINGS

EEOC Case No. 15DA600085

FCHR Case No. 2005-02829

DOAH Case No. 06-3664

FCHR Order No. 07-033

**FINAL ORDER DISMISSING PETITION FOR
RELIEF FROM AN UNLAWFUL EMPLOYMENT PRACTICE
AND DENYING RESPONDENT'S REQUEST FOR
ATTORNEY'S FEES AND COSTS**

Preliminary Matters

Petitioner Mildred Spears filed a complaint of discrimination pursuant to the Florida Civil Rights Act of 1992, Sections 760.01 - 760.11, Florida Statutes (2005), alleging, among other things, that Respondent C. J. Gayfers and Company, d/b/a Dillards, committed unlawful employment practices on the bases of Petitioner's age (DOB: 1-7-55) and race (Black) by denying Petitioner training and subjecting Petitioner to different terms and conditions of employment, including a demotion and reduction in salary.

The allegations set forth in the complaint were investigated, and, on August 26, 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 by video teleconference on November 20, 2006, at sites in Pensacola and Tallahassee, Florida, before Administrative Law Judge Suzanne F. Hood.

Judge Hood issued a Recommended Order of dismissal, dated February 8, 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.

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 February 22, 2007. The document contains paragraphs numbered 1 through 8, excepting to the Administrative Law Judge's findings of fact, although there is no number "7." In addition, exceptions are presented to the conclusions of law.

The exceptions to the findings of fact take issue with the facts found (paragraphs 1, 2 and 5), facts not found (paragraphs 6 and 8) and inferences drawn (paragraphs 3 and 4) 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 to the findings of fact are rejected.

With regard to the conclusions of law, Petitioner excepts to the Administrative Law Judge's conclusion that an "adverse employment action" did not occur in this case.

The presence of an "adverse employment action" is an element of establishing a prima facie case of discrimination. In this case, the Administrative Law Judge concluded that, even if a prima facie case of discrimination had been established, Respondent had a legitimate, nondiscriminatory reason for reassigning Petitioner to a larger work center and subsequently reducing her pay rate based on decreased sales, namely, to establish training areas for new employees in small work centers and to move more experienced

higher paid sales associates to larger work centers that could support a higher rate of pay (Recommended Order, ¶ 75).

The Administrative Law Judge further concluded that this policy was race and age neutral on its face and as applied in this case, and that Respondent's objective business decisions and compensation policy were not a pretext for discrimination (Recommended Order, ¶ 75 and ¶ 76).

Consequently, even if this exception were accepted, the outcome of the case would not change.

This exception is rejected.

Finally, Petitioner also excepts to the Administrative Law Judge's finding that Respondent's legitimate, nondiscriminatory reason for reassigning Petitioner, was legitimate and nondiscriminatory. In our view, this is a finding within the purview of the Administrative Law Judge to make, based on the evidence presented. See Barr, supra, and Bowles, supra.

This exception is rejected.

Respondent's Request for Attorney's Fees and Costs

Respondent filed a response to Petitioner's exceptions in a document entitled, "Respondent Dillard's, Inc.'s Response in Opposition to Petitioner's Exceptions to Recommended Order," received by the Commission on February 30, 2007. In this document, Respondent requests "an award of its costs and fees pursuant to Section 760.11(6), Florida Statutes."

The Florida Civil Rights Act of 1992 states that after an administrative hearing is conducted in a case like the instant case where the Commission's investigation has resulted in the issuance of a "no cause" determination, "...the [C]ommission, in its discretion, may allow the prevailing party a reasonable attorney's fee as part of the costs. It is the intent of the Legislature that this provision for attorney's fees be interpreted in a manner consistent with federal case law involving a Title VII action." Section 760.11(7), Florida Statutes (2005).

In conclusions of law adopted by a Commission panel, it has been stated that a prevailing Respondent may be awarded attorney's fees by the Commission, under the Florida Civil Rights Act of 1992, "if it is determined that an action was 'frivolous, unreasonable, or without foundation,' or 'that the plaintiff continued to litigate after it clearly became so.' Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421-422 (1978)." Tadlock v. Westinghouse Electric Corporation, d/b/a Bay County Energy Systems, Inc., 20 F.A.L.R. 776, at 777 (FCHR 1997), citing Wright v. City of Gainesville, 19 F.A.L.R. 1947, at 1959 (FCHR 1996). Accord, generally, Asher v. Barnett Banks, Inc., 18 F.A.L.R. 1907 (FCHR 1995).

In conclusions of law adopted by a Commission panel, this pronouncement is given explanation: "It is within the discretion of a district court to award attorney's fees to a prevailing defendant in a Title VII action upon a finding that the action was 'frivolous,

unreasonable, or without foundation, even though not brought in subjective bad faith.’ Christianburg Garment Co. v. EEOC, 434 U.S. 412, 421, 98 S.Ct. 694, 700, 54 L.Ed.2d 648 (1978). The standard has been described as a ‘stringent’ one. Hughes v. Rowe, 449 U.S. 5, 14, 101 S.Ct. 173, 178, 66 L.Ed.2d 163 (1980). Moreover, the Supreme Court has cautioned that in applying these criteria, the district court should resist the temptation to conclude that because a plaintiff did not ultimately prevail, the action must have been unreasonable or without foundation. Christianburg Garment, 434 U.S. at 421-22, 98 S.Ct. at 700-01. Therefore, in determining whether a prevailing defendant is entitled to attorney’s fees under Title VII, the district court must focus on the question of whether the case is seriously lacking in arguable merit. See Sullivan v. School Board of Pinellas County, 773 F.2d 1182, 1188 (11th Cir. 1985).” Doshi v. Systems and Electronics, Inc., f/k/a Electronics and Space Corp., 21 F.A.L.R. 188, at 199 (FCHR 1998). Accord, Haynes v. Putnam County School Board, FCHR Order No. 04-162 (December 23, 2004) and Waaser v. Streit’s Motorsports, FCHR Order No. 04-157 (November 30, 2004).

While noting that, based on our votes at the April 26, 2007, Commission deliberation of this matter as reflected in the content of this Order, above, Respondent is the prevailing party in this matter, we conclude, as is our statutory discretion, that the record of this case does not reflect entitlement by Respondent to attorney’s fees and costs under the standards set out above, and that, therefore, Respondent’s request for attorney’s fees and costs is DENIED. Accord, generally, Haynes, supra, in which a Commission panel utilized the following language in its order denying the Respondent’s motion for attorney’s fees and costs: “We conclude, as is our discretion, the record does not otherwise reflect entitlement to attorney’s fees under the standards set out above.”

Dismissal

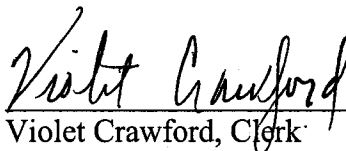
The Petition for Relief and Complaint of Discrimination are DISMISSED with prejudice.

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
2009 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:

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c/o Christopher E. Varner, Esq.
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C. J. Gayfers and Company, d/b/a Dillard's
c/o Lori R. Benton, Esq.
Ford & Harrison, LLP
300 South Orange Avenue, Suite 1300
Orlando, FL 32801

Suzanne F. Hood, 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: *Kiell Crumford*
Clerk of the Commission
Florida Commission on Human Relations