

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

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THERESA L. DAWSON,

EEOC Case No. NGNE
FCHR Case No. 2006-01499

Petitioner,

DOAH Case No. 06-3788

v.

BANK OF AMERICA,

FCHR Order No. 07-069

Respondent.

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

Preliminary Matters

Petitioner Theresa L. Dawson 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 Bank of America committed an unlawful employment practice on the bases of Petitioner's race (Black) and age (DOB: 4-7-59) when it terminated Petitioner from employment.

The allegations set forth in the complaint were investigated, and, on September 13, 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 August 9 and 10, 2007, in Orlando, Florida, before Administrative Law Judge R. Bruce McKibben.

Judge McKibben issued a Recommended Order of dismissal, dated October 9, 2007.

Pursuant to notice, public deliberations were held on December 12, 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

Respondent filed exceptions to the Recommended Order of the Administrative Law Judge, received by the Commission on October 19, 2007.

Respondent excepts to the failure of the Administrative Law Judge to award it attorney's fees and costs under Section 57.105, Florida Statutes, and under the Florida Civil Rights Act of 1992, itself.

Generally speaking, Section 57.105, Florida Statutes, provides a mechanism for awarding attorneys fees as a sanction against a party who has raised unsupported claims and defenses. See Statute.

The Commission does not have "final order" authority over an award granting or denying attorney's fees and damages pursuant to Section 57.105, Florida Statutes. See Section 57.105(5), Florida Statutes (2007), indicating that, in administrative proceedings, attorneys fees sought under this section shall be awarded by an Administrative Law Judge and that for purposes of appeal such award shall be a "final order."

Consequently, in the absence of Commission jurisdiction over awards pursuant to this statutory section, this exception is denied. Accord, Toms v. Marion County School Board, FCHR Order No. 07-060 (November 7, 2007), and Jones v. Suwannee County School Board, FCHR Order No. 06-088 (September 11, 2006).

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 (2007).

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).

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, especially given the Administrative Law Judge's finding that while the facts did not support Petitioner's allegation it was not a frivolous charge in and of itself (see Recommended Order, "Recommendation" section), and, therefore, Respondent's exception to the denial of attorney's fees and costs under the Florida Civil Rights Act of 1992 is rejected. 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." Also, accord, generally, Quintero v. City of Coral Gables, FCHR Order No. 07-030 (April 20, 2007), and Spears v. C.J. Gayfers and Company, d/b/a Dillards, FCHR Order No. 07-033 (May 1, 2007).

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 17th day of December, 2007.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam, Panel Chairperson;
Commissioner Shahrukh S. Dhanji; and
Commissioner Billy Whitefox Stall

Filed this 17th day of December, 2007,
in Tallahassee, Florida.



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R. Bruce McKibben, 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 17th day of December, 2007.

By:

Violet Crawford

Clerk of the Commission

Florida Commission on Human Relations