

STATE OF FLORIDA
COMMISSION ON HUMAN RELATIONS

FILED

2009 OCT -2 A 10:45

DE' ANTHONY SHAMAR,

EEOC Case No. 15D200700863

Petitioner,

FCHR Case No. 2007-02580

v.

DOAH Case No. 08-1926

CITY OF SANFORD,

FCHR Order No. 09-092

Respondent.

**FINAL ORDER CLOSING FILE AND DISMISSING CASE
AND RULING ON PENDING MOTIONS**

This matter is before the Commission for consideration of the Order Declining Remand, dated July 8, 2009, issued in the above styled matter by Division of Administrative Hearings (DOAH) Administrative Law Judge Daniel Manry, Petitioner's "Exceptions To Administrative Law Judge Manry's Order Declining Third Remand, Request for Expedited Review and Renewed Motion For Hearing By Commissioner Or, In Alternative, To File Mandamus Action Against Department of Administrative Hearings," and "Petitioner's Memorandum In Support Of Its Exceptions To Order Declining Third Remand By Administrative Law Judge Manry, Request For Expedited Review And Renewed Motion For Hearing By Commissioner Or, In Alternative, To File Mandamus Action Against The Department Of Administrative Hearings," both received by the Commission on July 22, 2009, and "Respondent, City of Sanford's Response to Petitioner's Exceptions To Administrative Law Judge Manry's Order Declining Third Remand, Request For Expedited Review And Renewed Motion For Hearing By Commissioner Or, In Alternative, To File Mandamus Action Against Department of Administrative Hearings," filed with the Division of Administrative Hearings on July 30, 2009.

Preliminary Matters

This is the fourth time this case is before a Panel of Commissioners.

Judge Manry issued a Recommended Order of Dismissal in the matter, dated September 11, 2008.

The issue before the Administrative Law Judge at that time, and before the first Commission Panel, was whether the Division of Administrative Hearings and the Commission had jurisdiction over the allegations in the third Charge of Discrimination filed against Respondent and subsequent Petition for Relief filed by the Petitioner, given the pending suit filed by Petitioner in Federal District Court.

The Administrative Law Judge concluded that the Federal District Court retained jurisdiction over both the retaliation claims and claims of discrimination set out in Petitioner's third Charge of Discrimination and subsequent Petition for Relief, and that under Section 760.11(4), Florida Statutes, the Federal Court became Petitioner's exclusive remedy. Recommended Order of Dismissal, Pages 1 and 2.

A Commission Panel consisting of Commissioners Donna Elam, Anice R. Prosser, and Billy Whitefox Stall concluded that the record as it existed before them did not contain competent substantial evidence to support the Administrative Law Judge's finding that the Federal District Court had retained jurisdiction over the discrimination and retaliation claims set out in Petitioner's third Charge of Discrimination, and that the matter should, therefore, be remanded to the Administrative Law Judge for further proceedings on the Petition for Relief related to both the claims of discrimination and retaliation set out therein. An "Order Remanding Petition for Relief from an Unlawful Employment Practice," FCHR Order No. 09-007, so indicating was issued by the Commission on January 13, 2009.

Judge Manry issued an "Order Declining Remand," dated February 3, 2009, stating, "Alleged incidents of discrimination and retaliation in the third Charge of Discrimination which the Court determines in a subsequent evidentiary hearing to be beyond the scope of the Court's ancillary jurisdiction in the existing federal lawsuit may, or may not, be fair game for disposition in an administrative hearing. At this juncture, however, no such incidents of alleged discrimination exist because the Court has not found in a separate evidentiary hearing that any of the alleged incidents of discrimination and retaliation in the third Charge of Discrimination fall outside the Court's ancillary jurisdiction." Order Declining Remand, ¶ 26.

A Commission Panel consisting of Commissioners Onelia A. Fajardo, Watson Haynes, II, and Anice R. Prosser, concluded, consistent with the Commission's previous Order Remanding Petition for Relief from an Unlawful Employment Practice, which concluded that the record as it existed before the Commission did not contain competent substantial evidence to support the Administrative Law Judge's finding that the Federal District Court had retained jurisdiction over the discrimination and retaliation claims set out in Petitioner's third Charge of Discrimination, and consistent with the Order Declining Remand then before the Commission, which suggested that further administrative proceedings in the matter could be appropriate upon a showing that the federal Court had determined that claims in the third Charge of Discrimination are beyond the federal Court's ancillary jurisdiction, that the matter should be remanded to the Administrative Law Judge for the taking of evidence as to whether such a determination had actually been made by the federal Court, since no opportunity to present such evidence had yet been given the parties. An "Order Remanding Petition for Relief from an Unlawful Employment Practice and Denying Without Prejudice 'Petitioner's Motion to Set Evidentiary Hearing Before Commissioner'," FCHR Order No. 09-034, so ordering was issued by the Commission on April 9, 2009.

Judge Manry issued an "Order Declining Second Remand," declining the remand of the Commission set out in FCHR Order No. 09-034 for two reasons. First the order indicates, "The Second Order of Remand does not state a factual basis which satisfies the statutory prerequisites

for DOAH to conduct a 120.57 proceeding. For example, the Second Order of Remand does not state that the parties dispute the federal court's determination of the court's ancillary jurisdiction or that any such dispute between the parties involves a material fact." Second, the order states, "Nor does the Second Order of Remand state that all of the parties have agreed to confer jurisdiction on DOAH in the absence of a disputed issue of material fact."

A Commission Panel consisting of Commissioners Gilbert M. Singer, Watson Haynes, II, and Patty Ball Thomas concluded that the filings of the Petitioner and Respondent in response to Judge Manry's Order Declining Second Remand resolved these issues, noting that based on those filings "a disputed issue of material fact exists in this matter as to whether the federal Court has determined that claims in the third Charge of Discrimination are beyond the federal Court's ancillary jurisdiction. This fact is material because its resolution determines whether the Commission and the Division of Administrative Hearings have jurisdiction of the allegations contained in Petitioner's third Charge of Discrimination." With regard to the issue related to the parties conferring jurisdiction on DOAH in the absence of a disputed issue of material fact, the Commission Panel concluded that, based on their filings, "the parties both agree to confer jurisdiction on DOAH even in the absence of a disputed issue of material fact."

Therefore, the Commission Panel, again, remanded the case to the Administrative Law Judge for further proceedings on the Petition for Relief. An "Order Remanding Petition for Relief from an Unlawful Employment Practice and Denying Without Prejudice 'Petitioner's Renewed Motion for Hearing by Commissioner or, in Alternative, to File Mandamus Action Against Department (SIC) of Administrative Hearings'," FCHR Order No. 09-071, so ordering was issued by the Commission on June 30, 2009.

Findings of Fact and Conclusions of Law

Judge Manry's "Order Declining Remand," currently before the Commission, declines the remand of the Commission set out in FCHR Order No. 09-071, issued by the Commission on June 30, 2009.

The order apparently declines the Commission's remand on the stated basis that the Florida Civil Rights Act of 1992 "does not authorize either the Commission or DOAH to decide which claims have been excluded from the ancillary jurisdiction of the Federal Court while the issue is pending before the Court."

We note that this is the third time the Administrative Law Judge has declined the Commission's remand directing further proceedings on the Petition for Relief.

While as concluded in FCHR Order No. 09-007, the Commission has held that Petitioner is entitled to further proceedings on the Petition for Relief related to both the claims of discrimination and retaliation set out in Petitioner's third Charge of Discrimination, the Administrative Law Judge's refusal to accept the Commission's remand and conduct those further proceedings effectively ends the case. There is no forum in which those proceedings can be conducted.

Consequently, the Commission is faced with no further option other than to close its file and dismiss the case.

Exceptions

As indicated, above, Petitioner filed exceptions to the Administrative Law Judge's Order Declining Remand, received by the Commission on July 22, 2009.

For reasons stated in the "Findings of Fact and Conclusions of Law" section of this Order, above, Petitioner's exceptions to the Administrative Law Judge's Order Declining Remand are denied.

Ruling on Motions

Petitioner's motion to have the matter set for hearing before a Commissioner is hereby DENIED.

Petitioner's motion to have the Commission file a mandamus action against the Division of Administrative Hearings is hereby DENIED.

Dismissal

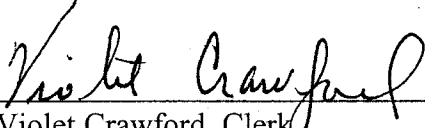
The Commission's file in this matter is hereby CLOSED and the case DISMISSED.

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 of 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 October, 2009.
FOR THE FLORIDA COMMISSION ON HUMAN RELATIONS:

Commissioner Donna Elam, Panel Chairperson;
Commissioner Lizzette Gamero; and
Commissioner Watson Haynes, II

Filed this 1st day of October, 2009,
in Tallahassee, Florida.



Violet Crawford, Clerk
Commission on Human Relations
2009 Apalachee Parkway, Suite 200
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:

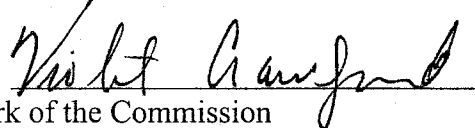
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Daniel Manry, Administrative Law Judge, DOAH

Lawrence F. Kranert, Jr., FCHR Chief Legal Counsel, 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 October, 2009.

By: 

Clerk of the Commission
Florida Commission on Human Relations